Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaints by Julia deSousa dated February 9, 1994; alleging discrimination in employment on the basis of sex, sexual harassment, solicitation and reprisal.

B E T W E E N:

Ontario Human Rights Commission

-and-

Julia deSousa

Complainant

-and-

Maurice Gauthier and Emilien Gauthier

Respondents

DECISION

Adjudicator : Patricia E. DeGuire

Date : May 22, 2002

Board File No. : BI-0293-99

Decision No. : 02-009

Board of Inquiry (*Human Rights Code*)
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A P P E A R A N C E S

Ontario Human Rights Commission	)	Raj Dhir, Counsel
Julia deSousa, *Complainant*	)	on her own behalf
Maurice Gauthier, Personal Respondent	)	Paul Marshall, Counsel
Emilien Gauthier, Personal Respondent	)	on his own behalf

INTRODUCTION

This case is about gender-based discrimination. It includes the predacious grounds of sexual harassment, sexual solicitation and the retaliatory act of dismissal from employment. Essentially, the allegations are that the two personal respondents sexually harassed the complainant, ("JD"), who was an employee. She alleges that she was fired when she tried to assert her human rights as protected under the *Human Rights Code*, R.S.O., 1990, c. H.19, as amended ("the *Code*"). The Respondents denied these allegations or put forward justifications for their acts.

More specifically, in this case, instead of using management authority to take appropriate steps to develop and cultivate human rights culture in the workplace, the Respondents were indeed the perpetrators who preyed upon the then young and vulnerable JD. Instead of a healthy work environment, JD found herself in a poisoned work environment where lewd sexual levity was the order of the day and she was the object of the vilest forms of sexual advance or solicitation or both, as well as sexual innuendos and sexual harassment.

On February 9, 1994, JD filed a formal complaint with the Ontario Human Rights Commission ("Commission"). She alleged that, with respect to employment, Ultimate Truck Repair Paint and Collision ("UTR"), Emilien Gauthier ("Emilien") and Maurice Gauthier ("Gauthier") violated her rights as protected within the purview of subsections 5(1), 7(2), paragraph 7(3)(a) and section 8 of the *Code*: ("Complaint"). Those parts of the *Code* are reproduced below under the section captioned "The Law."

RELEVANT STATUTORY LAW

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
>
> 7. (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

7. (3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advance to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advance to the person. R.S.O. 1990, c. H.19, s. 7.

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

ISSUES

The Board deals with six issues arising from the subject-matter of the Complaint referred to it. They are listed below.

1. For the purpose of the *Human Rights Code* ("*Code*"), what was Emilien Gauthier's status at UTR, at the relevant times, during the course of this matter?

2. Did the Respondents violate JD's right to equal treatment with respect to employment without discrimination because of her gender within the purview of subsection 5(1) of the *Code*?

3. Did the Respondents violate JD's right to freedom from harassment in the workplace because of her gender by her employer or agent of the employer or by another employee within the purview of subsection 7(2)?

4. Was JD's right to be free from sexual solicitation or advance within the purview of paragraph 7(3)(a) violated?

5. Was JD's right to claim and enforce her rights under the *Code* pursuant to section 8 violated by the Respondents?

6. Finally, what is the appropriate remedy?

DECISION

The Board finds that at the relevant times Emilien was an owner, director or officer of UTR. Alternatively, at the very least, he was an agent or *de facto* employee or both of UTR. (The Board expands on this issue in the section captioned "Emilien's Relation to UTR.") In that capacity, he violated JD's rights as protected by the *Code* on the grounds of against JD in sex, sexual solicitation, sexual harassment and reprisal. In addition, the Board finds Gauthier was an owner or partner, director or officer, an employer at UTR at all relevant times in this matter. He violated JD's rights, in employment, on the grounds of sex, sexual harassment, sexual solicitation or advance and reprisal. Both Respondents are jointly and severally liable. The Board sets out its remedial orders under the heading entitled "Order".

PRELIMINARY ISSUES

On November 22, 1999, the Commission referred the subject-matter of the Complaint to the Board of Inquiry ("Board"). On November 24, 1999, the Board dispatched a "Notice of Hearing" to all the parties or their representatives. On December 20, 1999, by conference call, the Board commenced the hearing in this matter. Ms K. Malik represented the Commission. The Complainant represented herself. Emilien and Gauthier represented themselves.

Subsequent to the referral, the Commission informed the Board, by e-mail, that before referring the subject-matter to the Board, it had taken the decision not to proceed against the corporate respondent because that entity was no longer in business. During the conference call, the issue whether UTR was the corporate respondent was raised. The Board ruled that if the Commission wished to strike that party from the complaint, it could do so by consent motion. It directed the Commission to inform the Deputy Registrar of its intention by January 20, 2000. In the Commission's pleadings dated January 18, 2000, it names only the personal Respondents. The Board accepts that as sufficient for the resolution that UTR is not a party in this matter. Accordingly, the Board orders that UTR be removed from the Complaint as a party.

SUMMARY OF EVIDENCE

The Board sat for twenty-two days hearing the evidence in this case. The Commission and Complainant put forward their case through four witnesses, namely: JD, who is also the Complainant; Desi Adamcik ("Adamcik"); Kiran Uppal and Silvilyn Holt. The Respondents put forward their evidence through six witnesses, namely: Gauthier, who is also a respondent; Emilien, who is also a respondent; Annette Gauthier ("Ms Gauthier"); Carolyn Daniels ("Ms Daniels"); Brad Maitland ("Maitland"); and Hank Jansen Van Doorn ("Van Doorn").

The Board deems it necessary to summarise the evidence of this proceeding: that follows immediately below. The Board's findings of facts are dealt with under the heading entitled "Findings of Facts".

JD's Employment, Duties and Relations

JD was a young single parent of 24 years. Her seven-year marriage had ended in December 1992. She had temporary interim sole custody of her son. JD was in the throes of proceedings for the custody of her four-year old son and divorce. JD states that she was destitute. She had no money. She was unemployed. Her only sources of income were stipends from Social Services and Child Tax Credit. She needed a job to provide for herself and her son, and to gain full custody of him.

JD testifies that Adamcik, who is a family friend, told her UTR was looking for a secretary. She told him she was interested in the job. To her knowledge, Adamcik had informed UTR of her interest in employment. On the last weekend of May 1993, she had an interview with Gauthier, an owner of UTR. During the interview, which lasted about ten minutes, they discussed her qualifications, employment history, job duties, wages, pay arrangements and commencement date. Gauthier hired her on the spot. They agreed that she would commence work on the following Monday, May 31, 1993. Gauthier told her that her duties would include doing the payroll. She informed him that she did not have such experience. In response, he told her that it was not a problem to learn and that his sister, Sue Porter, would teach her.

She states Gauthier hired on a part-time basis, but he then asked her to work a forty-hour week or more. They agreed on a wage of $10 per hour. Regarding her pay arrangement, Gauthier told her that since technically, he did not want to hire her full-time and add her to his payroll, he would pay her through Triple "A" Holdings. Adamcik was the proprietor of Triple "A" Holdings. Essentially, every fortnight Gauthier would issue a cheque equal to JD's wages payable to Triple "A" Holdings as a bonus. In turn, Adamcik would pay JD an equal sum. The rationales were she was on Social Services and Gauthier wanted to see whether their arrangement would work out…"sort of a probationary period," JD states. JD testifies that she had informed her social worker that she was working.

JD testifies that at the commencement of her job, she realized that of about fifteen to twenty employees she was the only female. Her duties were all and sundry. Specifically, among other things, she was expected to answer the telephone and relay messages to body shop employees; do the payroll and maintain payroll records (including the recording and tallying of her timesheet); do the accounts payable and receivable; pick up and sort the mail; do the clerical work; do the bank deposits; make the coffee and because there was no general office cleaner, she was told to clean the men's toilet. JD expresses consternation:

> I was surprised because at the interview stage I was not aware that I was required to [clean the men's toilet]…I did not like having to clean the bathroom. First of all, it was filthy – disgustingly filthy. There were pictures of various things on the walls that made me uncomfortable. [There were] sunshine girls and copies of certain things. I was also wearing nice office outfits, and considering the state the bathroom was in, I didn't think it was right for me to be in there cleaning. Physically, I had to clean the toilet, clean the sink, attempt to clean the floor and pick up the garbage.

Notwithstanding her concerns, JD states that she did not refuse to do those tasks because she was "grateful that she had a job." Besides, there was some flexibility. She did not have a specific start time. She tried to be at work between 8:00 hours and 9:00 hours and would finish anywhere between 17:00 to 19:00 hours. Sometimes, subject to Gauthier's approval, her work hours varied.

JD testifies that daily she recorded the time she had commenced and finished work on her timesheet and then tallied and recorded the total hours she had worked: (*Exhibit* 1). Gauthier approved that process. To prepare the payroll and cheques, which she did fortnightly, she would add up the hours recorded on her timesheet to calculate the amount of wages she was due. Similarly, each employee would complete his timecard and submit it to her fortnightly. She would verify the stated hours, tally the recorded hours to prepare their cheques and submit the cheques and the timecards and her timesheet to Gauthier for his approval and signature.

Payday was Monday fortnightly. She knew Gauthier reviewed the timecards and sheet before he signed the pay cheques. On several occasions he had asked her to void a cheque because he felt the employee did not work the hours he had recorded on the timecard. Usually Gauthier returned the entire payroll, with the signed cheques to her. She would insert the time card or sheet in the employee's file and distribute the cheques.

Adamcik's evidence concerning how JD heard about the job at UTR is similar to JD's account. He avers that he believed JD did not have the required experience to do the job. But he believed she was an intelligent woman and was capable of learning the job. He asserts that when he told Gauthier about JD, Gauthier told him to bring her in and he would try her out and see how that arrangement was workable. Gauthier did hire JD: but he did not want to put her on payroll until he knew she was able to do the job. So initially, Gauthier paid her wages to Triple A Holdings as a bonus for Adamcik. When JD became full-time, around early July 1993, UTR no longer paid him bonuses.

Commission counsel asked Adamcik directly whether he had had an amatory relationship with JD. He states that he and JD never had an amatory or physical relationship. He testifies that after he left UTR he spoke to JD almost daily. In his view she called him because she had no one else and she was in a middle of a divorce. He testifies that they had not discussed the case prior to giving evidence.

Gauthier testifies that Adamcik introduced him to JD. He met with her on a Saturday in April 1993 for about five to ten minutes. During that time, they discussed job duties, including

answering the telephone and "sorting out paper work ...for the Bookkeeper." She was not required to do anything else. They discussed wages and agreed to $10 an hour. At that point JD had told him that she did not want to go on his payroll because she was going through a bad divorce. He avers he was curious and asked her why she made such a request. She told him that she was concerned about having her wages garnished. They agreed that she would be paid under Adamcik's company, Triple A Holdings. He believed she did not want anyone, mainly her estranged spouse, to know that she was working. He decided to hire JD on the spot that Saturday after the brief interview. They decided on workday between 08:00 hours and 17:30 hours. She was required to work a forty-four hour workweek.

Work Performance

JD asserts that on or about July 16, 1993, Gauthier informed JD that she would be given the opportunity to become a full-time employee as at Monday, July 19, 1993. In addition, she would receive a raise of $2 per hour. He had informed her that he was very satisfied with her work and that clients, customers and suppliers had spoken laudably about her performance. However, during that eight-months period of employment, she did not receive any formal performance appraisals or reviews.

JD states that from time to time, Gauthier and Emilien had informed her that she was doing a "good job" and told her "to keep up the good work." Customers told her that they were pleased with the efficiency of her work. The bookkeeper, Ms Daniels, had told her that she was amazed at how well she was performing her duties because UTR was not computerised. However, there were times when she was chastised or criticized by Emilien and Gauthier.

Gauthier and his father Emilien, who had some financial interest in the business at some point, had gotten frustrated about her attitude on certain things. For example, they had commented unfavourably about her personal telephone calls; her demeanor regarding message-taking for the shop employees; misplaced invoices; on a few occasions, her lateness for work; on one occasion, she was chided for attending an office meeting; on one occasion, when she wanted to call the health department; and on one instance, when she took extra time for lunch. In her testimony, JD expands on the nature of each of those episodes.

Regarding the personal telephone calls, she made the most calls on her personal time. In September 1993, however, just before her lunch hour her son's school had called to inform her that the school bus driver had lost her son. Panicked, she called her babysitter at once. JD says Gauthier was upset because she had made those telephone calls during work hours. She explained her dilemma and told him that she would make up the time. She did make up the time by working late.

Concerning the way she handled telephone message for shop employees, she states that she use to deliver messages to the men in the shop. She was asked not to give messages to shop employees. Instead, she was asked to leave the messages in the foreman's office where the employees could retrieve them during their break or lunch. She complied.

Regarding misplaced invoices, she claims that invariably, Gauthier would blame her whenever an invoice was misplaced. She states that invariably, the missing invoice would be found on Gauthier's desk under mounds of other papers. Or she would find the invoice(s) misfiled by going through the manual alphabetic filing system that she created. Gauthier was responsible for misfiling them. When she protested that it was not her fault, he would make light of it.

With respect to her punctuality, JD testifies that she was late a few times. She explained that she was held up in traffic. She agreed to be more punctual and proffered to make up the time, and did so.

With respect to extended lunch breaks, JD testifies that late December 1993, there was neither heat nor water in the washroom facilities. As a result, she sat at her desk wearing her boots and a long winter coat. She was unable to go to the washroom until lunchtime. At lunch, she went to Tim Horton. It was very busy there. As a result, she spent an extra ten minutes beyond her lunchtime. On her return, Gauthier chastised her for being late and blamed her for the other employees who were late. She explained why she was late, promised to and did make up the time. JD referenced this to the event that same day when she had threatened to call the health department because the building was without heat and water, and there were rats running

around on the floor. She asked Gauthier if she could call the health department to inspect the building. He became very angry with her. He "lunged" towards her work area and told her if she called the health department she would be sorry. She was too afraid to call and did not.

Concerning the office meeting, she avers that on one occasion she was asked to attend a meeting. During the meeting she tried to defend an ex-employee who was being accused of stealing tools. Gauthier screamed at her for attending the meeting and for defending the ex-employee.

JD testifies that her work performance was "good". In addition, to those negative comments from Gauthier and Emilien, both made other gratuitous comments that were beyond the scope of work. That aspect of her complaint is dealt with under the heading "Discrimination with Respect to Employment." Immediately below is Gauthier's evidence on this issue.

Gauthier testifies that at the beginning, JD's performance was "fair", in that she did her work "diligently" and was courteous to customers. He thought JD did the Accounts Receivable and Payable and bank balancing "very well". He knew nothing about that aspect of the business. About five to six weeks into her employment he hired her on a full-time basis. He asserts that initially JD was not pleased about it because she was being paid and no one knew where she was working. He avers that he was nervous about the secrecy and that is why he asked her to go full-time so that he could add her to the company's payroll. Gauthier asserts that he had had enquiries from the Bookkeeper about the number of employees, the amount of Account Receivables and Payables. He says that Ms Daniels had informed him that it was improper to pay someone under another company if that person was working for his company. When he added JD to the payroll, he gave her a wage increase from $10 to $12 per hour. There was no need for JD to stay late. He says he was quite insistent that employees should not work overtime because it was costly to the company.

Gauthier avers that after JD became a full-time employee, her performance and punctuality deteriorated. She had problems reconciling the bank statements, she failed to follow the instructions of Daniels, the bookkeeper, and she began disrupting the shop. For instance, she

would go into the shop and took coffee breaks that lasted one half to an hour, or meetings about the operation of the company. He avers that this was done two or three times weekly. When asked why he had tolerated JD's behaviour. He says that he did not. He states that he had "a" discussion with JD and told her she was not allowed to go into the production floor for safety reasons and because she was disrupting production. He testifies that they lasted "fifteen minutes or more." He states that the meetings and coffee breaks did not happen at the same time. He says, "usually" he was out of the office.

When asked if he was out of the office how he knew the meetings and breaks had taken place. He says the foremen, Brad Maitland and Van Doorn had informed him. Also, Emilien had told him that JD had called a meeting to discuss the low morale of the workplace. He avers that the meetings and JD's behaviour started early September and continued through December 1993. Gauthier's counsel asked when JD began to arrive late to work. He replies that it started in the first part of September 1993 and happened "pretty often about three times per week." He explains that he thought some of JD's lateness could be attributable to the fact that she was taking her child to daycare in the mornings. He believes that is what JD told him then. To his recollection, she did not give any other reason. Gauthier avers that on one occasion during a discussion, he tried to explain to JD that it was crucial for her to be early because there was no one else to answer the telephone, and it was important that the customers reach someone promptly. He states that JD did not say much in response, but he felt she understood why she had to be at work early to answer the telephone.

Gauthier was asked when that meeting took place. He replies early September, likely on a Tuesday. Also, he avers that he had spoken to JD about her lateness after lunch. He relates that on one particular occasion, around late September 1993, JD had taken an extended lunch. He states that he had chided her for taking a two to three hour lunch break. He says she had replied that she did have lunch with the manager of a potential customer and thought it would be of benefit to UTR. Gauthier states that he was not pleased. He had lost two to three hours of work answering the telephone. So "[I] kind of told her that she didn't have to go out with customers to benefit the company." He comments that he would never ask an employee to go to lunch with anyone for the company's benefit.

Gauthier avers that JD was responsible for keeping a record of the last ten transactions so that he would have immediate knowledge of his bank balance. He states that JD failed to keep accurate records of transactions with his banker. He asserts that numerous times he was unable to secure an accurate balance. As a result, the "odd cheque bounced." He adds "the key concern was to keep accurate balance…because [he] needed to write cheques without being embarrassed that they were NSF….Suppliers would not look highly on that situation and in turn put holds on the account."

Gauthier was asked why some of JD's cheques were NSF. He replies that he had a cash flow problem in that he thought there was more money in the bank than there was. He was on a "strict operation" system with his bank. The bank had warned him that after four NSF cheques it would close his account. Without a business account, the business would not be viable. He states that he cannot recall whether JD had NSF cheques or whether she ever complained that her cheque was NSF, but he recalls putting a stop payment on her cheque. When asked if any other employee's pay cheque bounced, he replies, the odd one did. He added: "some of the employees were rushing to the bank that we dealt with to cash their cheques. I spent days before payroll was due collecting customers accounts to make sure that that payroll would go through, but employees decided to cause problems at the bank by rushing there on pay day. Because the deposit would be made the same day, it caused more work for the bank". He avers that when cheques were NSF, he replaced them immediately.

Gauthier testifies that he could not blame JD for NSF cheques. In addition, he admits that he had a cash-flow problem very early in the business. When Gauthier was asked if there were other problems with record keeping, he said there were not too many. He did work with JD constantly (about four to six times weekly) to rectify the accounts: they got together and sorted out the bank balances. Gauthier says that he first noticed problems with bank reconciliation around September 1992 and that lasted until November 1993. After November, he retained Daniels to deal with the accounting work. She attended the office two to three times weekly.

Gauthier asserts that from the time she was retained, around "August/September to late September/October, Ms Daniels complained to him, about three to four times, that JD "didn't work very well with her." He states that Ms Daniels informed him that JD failed to follow her instructions in that she failed to keep accurate records concerning Accounts Payable and Receivables and Payroll. Specifically, she had said that JD did not record "proper information on the books: either the numbers were inaccurate or she entered the information in the wrong column." Gauthier says he spoke to JD and asked her to cooperate with Daniels so that the books could be completed timely. JD agreed. He avers that "things improved somewhat," but there was a personality problem. He felt that JD did not want to work under Ms Daniels because JD felt that she was the office manager. Gauthier states that JD's "work improved substantially in the end, after their discussion around September to November 1993. Gauthier did concede that he realizes that he did not hire JD to be a Bookkeeper.

Gauthier states that he had problems issuing warning letters to employees. He did not give JD warning letters because "most of the errors were minor" and he treated his employees as friends. However, he considered the exaggeration of working hours and the disruption of the shop and refusal to follow instructions of a superior as major problems. When he was asked why he had not given JD warning letters for major problems, he asserts that most of the times he was on the road making sales and collecting money owed to his entity. He states that he felt he had "more important things to do." He says that when he had purchased the time clock around April or May 1993, he had discussed with JD that she should use the time clock like the other employees. However, she had opined that it was easier for her to record her hours manually. Besides, she was the only staff in the office and the location of the time clock was dusty.

Time Sheet Inaccuracies

Gauthier asserts that Van Doorn, the Operations Manager, had informed him that the hours recorded on certain employees' timesheets, including JD's, were inaccurate. Gauthier states that Van Doorn, from personal observation, would note whether employees were recording their time accurately and if they were not, he would adjust the time ticket to reflect the accurate time. Concerning JD, Gauthier states that he did not indicate to her that he was monitoring her

time. He avers that he began to monitor her time around early December 1993. He states that there were occasions when JD had worked six hours, and yet had recorded eight hours: JD was either late in arriving to work, took extended lunch or left early. His reason for not bringing it to JD's attention is: "I guess I was just checking the cost of the operation and what we were doing wrong." He asserts that he had contacted the Ontario Labour Relations Board ('OLRB"), which had given him advice about the appropriate action he could take. The OLRB had asked whether there was proper documentation to support his allegation that the timesheets was inaccurate.

Gauthier was asked what actions he took regarding JD's lateness, poor record keeping, disrupting the shop and inaccurate time recording. He states that around "Friday, January 12, 1994...the week before he received the call from the Commission," he had a meeting with Ms Daniels and Van Doorn (he is not sure if Maitland was present) and had discussed JD's performance and what they should do. Unanimously, they agreed that JD should be dismissed. He states that he "didn't put much weight on her lateness or the performance of her work. More emphasis was placed on the time not worked and the disruption in the shop that persisted constantly." Gauthier states that he had intended to terminate JD's employment on January 19, 1994. He asserts, "we had her papers ready for January 20. Caroline was to bring them in with her."

Gauthier was asked why he waited one week after the meeting to terminate JD's employment. He states that he wanted to find out what were the corporation's rights. To that end, he called his "legal contact", who advised him "to dismiss her for theft." He states that his "legal contact" advised him that he did not have to give JD severance pay because "theft is a very serious crime." He states that his "legal contact" asked him if he had thought about it carefully and if terminating JD was the best thing to do. He said he replied, that he had had a meeting with other staff and there were other problems. "So my opinion to him was to pay her one week severance and be finished with the problem."

Van Doorn's Evidence

In giving evidence, Van Doorn prefaces his testimony by stating that his recollections of events at UTR are quite limited. He recalls working at UTR, but he says that he cannot remember when he began. He is not sure whether JD was an employee when he began. He does not recall Adamcik as an employee at UTR. He states that initially he was a part-time employee, who came in the morning and "got the shop employees up and running." He assigned them jobs and showed them what to do. His duties did not include the mundane management of the office or monitoring employees in the office. Everyone was friendly and courteous: there were no arguments or backbiting. He does not recall whether he reviewed the time cards or if the employees recorded their time worked. More specifically, he cannot recall comparing or recording time cards for JD. He does not even recall whether the supervision of the time clock was integral to his job duty. Vaguely, he remembers that there was an issue about recording time worked. He does not recall informing Gauthier that JD was recording her hours incorrectly. He believes that it was Gauthier who had brought the issue to his attention.

Daniels' Evidence

Ms Daniels prefaces her evidence by stating that her memory of this matter is "a little fuzzy." She recalls that UTR was her client from the fall of 1993 and until around fall of 1994. She was retained as the bookkeeper. Her qualification is "three years of I.R.A." She declares that she is not a Chartered Accountant and had never claimed to be one. As an independent contractor for UTR, her duties included setting up an accounting system that would enable UTR to do its billing more efficiently, deal with accounts payables and receivables and processing the payroll bi-weekly.

She attended UTR two to three times weekly and spent about four to six hours each visit doing accounting duties. From time to time, JD assisted her in processing accounts payable and receivables and payroll. JD would help to sort bills, prepare them in her absence and compute the time sheets for employees so that she could prepare their pay cheques. She says her work relation with JD was "fairly friendly". She does not recall any conflicts. In her observation, JD was young and had a lot to learn. She says JD was "not always as careful with her clerical

duties" as she ought to have been. She avers that on one occasion some pay cheques had to be redone because JD gave her incorrect information. On another occasion, some computation of sales figures had to be redone because JD calculated them incorrectly. In her view, there was some problem about once weekly. In addition, Ms Daniels says that she observed that JD took more time than was necessary to do the banking. She says that the bank was about ten to fifteen minutes drive away. However, JD never took less than an hour to do the banking. Banking was done twice weekly.

In cross-examination by JD, Ms Daniels admits that at the beginning of her UTR contract she came to the office long enough to pick up the paper work and would not return until the following week because she was serving other clients. In fact, Ms Daniels admits that was the case for the first "couple of months" but thereafter, she came in weekly for two to three days. In addition, JD asked Ms Daniels about a motor vehicle accident in which Ms Daniels was seriously injured and could not come to UTR, and as a result, JD was required to bring paper work to her residence on several occasions. Ms Daniels denied there was an accident in the fall of 1993, and the severity of the accident. JD suggested that she was residing on Bloor Street in Mississauga, just east of Fieldgate. Ms Daniels replies that she had live two places while working at UTR, and did reside at a place on Bloor Street. JD asks her whether she recalled JD visited her on several times and they had worked together at her home – when on the very first visit, she showed JD bruises and how seriously she was hurt in the motor vehicle accident. Ms Daniels replies that she did not recall. JD told Ms Daniels that she recalls that Ms Daniels was not at UTR for most of December 1993 and January 1994. Ms Daniels refutes it and said she would check with her invoice. The witness has not submitted this information to the Board.

Ms Daniels avers that there were times when JD caused disruptions in the workplace in that she was running back and forth between her office and the shop and not answering the telephone. In Ms Daniels' observation, that was JD's behaviour whenever she attended UTR. She observed that pattern of behaviour about three to four times during the day and lasted anywhere from five to twenty minutes. Ms Daniels attributed JD's "lots of kidding and joking" around to her immaturity. She opined that JD was not serious enough for the working environment. Ms Daniels had spoken to her about telephone etiquette. When asked why she

chose to talk to her about telephone etiquette, she replies that it was proper to talk with a smile in one's voice as oppose to lose one's "temper or go too far on a limb." In response to a question about JD's telephone manners, she replies that most times JD did "very well". However, when asked again why she had not addressed other issues, she replies: "it wasn't my place. It was Maurice's. He was her employer." She added however, that she had asked JD to be careful with figures and when transposing information so that errors would be avoided. When asked about JD's response to her criticism, she replies that JD had promised to try to do better.

In cross-examination, Ms Daniels states that it was her observation that JD lost her temper "a couple of times," but she does not recall JD ever losing her temper with a customer. She added that a few times JD had lost her temper with vendors. She declares that vendors could get very irritable at times, especially when working with figures. In her view, the training in accounting was the cause of JD's frustration. Ms. Daniels admits that such training could cause anyone to be frustrated.

The Commission's counsel asks Ms Daniels whether she recalled giving a telephonic statement to an investigation from the Commission on or about April 29, 1999. She states that she might have, but she did not recall the date or the time. The Commission counsel asks Ms Daniels whether she recalls telling anyone from the Commission that JD was always smiling or joking, and that until the day she was laid off, she had never seen an angry side of her. Ms Daniels says she does not recall. Commission counsel put to Ms Daniels that she had made such a statement to the Commission's investigator.

Ms Daniels avers that despite her discussion with JD, her work performance did not improve. She spoke to Gauthier about JD's performance at least three times between November 1993 and January 1994. Ms Daniels states that on one occasion during a conversation with Gauthier about ways UTR could implement to become more efficient, she talked about JD's performance. In cross-examination she states that at the outset, the problems were not serious and in fact, became an issue only when UTR started to take shape as a going entity. Ms Daniels says she wanted to train JD to assume more duties as a means to make more efficient use of her

time. In her view, "…if you keep someone busy enough s/he doesn't have time to do anything else."

Ms Daniels evidence is that by December 1993, her attempts to train JD "were not working out very well." For instance, filing was "never" up-to-date, often she could not find the bills or they were not recorded and there were ongoing discrepancies with payroll hours. She had informed Gauthier and had asked him to speak to JD. Gauthier promised to would speak to JD. At the same time, Gauthier had asked her to work more hours because he wanted to lay off JD. Ms Daniels avers that they decided to take the position that the business was in trouble and Gauthier "was going to try to be kind" to JD and classify her termination as a "layoff" due to lack of work. Ms Daniels opined that if JD were able to do her job, Ms Daniels' job would have been redundant for there was only enough work for one person. Gauthier did not give her any feedback about his talk with JD.

In cross-examination, counsel for the Commission asked Ms Daniels whether she knew what JD's job duties entailed. She replies that they included accounts payable and receivables, payroll and sorting out invoices. She says JD did not do any bank reconciliation. She states that to her knowledge JD had no account experience. Counsel asked her if it would have been important to hire someone with much experience. She opined that it would have been, but UTR was a new company. She concludes: "when hiring, it would have been important to hire someone who could have done [accounting or bookkeeping] type of work."

Ms Daniels testifies that by January 1994, there were many problems. She states that when she arrived at UTR nothing was done. Around the first week in January 1994, again, she brought the problem to Gauthier's attention. He decided that he would terminate JD. When asked why did Gauthier took about a week to terminate JD, she states that she thinks Gauthier wanted to give JD a second chance. She avers that Gauthier is the type of person who was always giving second and third chances.

During cross-examination, counsel for the Commission asks Ms Daniels about the scope of her discussion in December 1993 and January 1994 with Gauthier regarding JD's termination.

Ms Daniels avers that in December 1993 they had discussed and "decided that there was a possibility of laying off [JD]." She stressed the only reason for that consideration was solely because of her work performance. JD was not performing her job properly. She recalls discussing JD's performance again with Gauthier in January 1994. She does not recall the exact date, but she "knew it was around the first half of the month." She states that no one else was present and no meeting was called. During that meeting, Gauthier decided to layoff JD. She avers at that time, the reason was solely because of JD's work performance.

Ms Daniels states that she made out JD's final cheque and Record of Employment ("ROE") documents, although she does not recall when she prepared the latter. She states that the date on the ROE would be the date she had prepared it. When asked whether the ROE was ready to be delivered, she replies that she always made up a ROE on the day it is being mailed or delivered and would not have made it out prior. More specifically, Ms Daniels states that she would have prepared the ROE at the office on the date it was signed: that date was January 24, 1994: (*Exhibit 13*). Ms Daniels recalls inserting JD's ROE in an envelope, but she does not recall whether she handed it to JD personally or mailed it to her.

Sex Discrimination, Sexual Harassment and Solicitation

JD says shortly after she began employment with UTR and throughout the course of her employment until she was terminated, she was subjected to numerous forms of discrimination. Specifically, JD avers that, among other things, she suffered sexual harassment, solicitation or advance at UTR. She testifies that the Respondents discriminatory conduct was continual and demonstrated in many forms during her employment. More specifically, Emilien or Gauthier or both made comments about the size of her breasts; her menstrual cycle; how she styled her hair; her style of dressing; oral and written levity; sexual touching and solicitation; and in one incident, Emilien pulled down her underpants. The evidence of each allegation and each witness are summarised below.

Size of her Breasts

JD asserts that Gauthier and Emilien made comments about her breasts. On one occasion, Emilien had said to her that Gauthier's spouse, Cheryl, would be jealous of her if Cheryl knew whom Gauthier had in the office as a secretary. He told her that she was fairly young to have such a well-endowed figure. She avers Gauthier was present when he made the comment. He just laughed. The comment was made within weeks of being hired. JD avers that she did not respond. She "thought he was a pig" not only because the comment was inappropriate, but also because that is not a comment one makes to a son about a daughter-in-law.

JD asserts that on two occasions, at least, Gauthier enquired about her cup size. In another incident that occurred about July 1993, she was running up the stairs when Gauthier said "careful, you are going to give yourself black eye if you don't slow down." She asked him what he meant by "black eye" and he just laughed. She did not think it was funny. Because he had referred to her breasts previously, and because a woman's breasts move when she runs, she thought he meant her breasts could hit her eyes when she ran. JD avers that comments about her breasts were ongoing.

Adamcik testifies that when the office was located on the second floor, around June to August 1993, he heard "innuendoes" and comments about JD. The comments included the size of her breasts, JD being asked to wear skirts as opposed to trousers and how JD should wear her hair were made mainly to Gauthier. He recalls Emilien commented that JD "has a nice pair of tits" and that he "would like to wrap her legs around [him]." He says that at the time he felt the comments were just jokes even though he felt they were inappropriate. He did nothing, because he did not think that the behaviour would escalate. He asserts that he heard similar comments when hanging around four or five of the "boys" during coffee or lunch breaks. The comments continued for quite some time and in the main, were made by Gauthier. But Gauthier's evidence differs remarkably.

Gauthier avers that on one occasion, around late August 1993, his spouse visited the shop. At that time, she met JD. He says JD asked him: "how could you like a woman who has small breasts?" He states he told her that he preferred small breasts and no further word was said about it. He asserts that at no other time did he make comments about the size of anyone's breasts.

Ms Daniels testifies that at no time had she ever heard Gauthier speak disrespectfully to anyone. Nor did she hear him comment about JD's breast size.

Menstrual Cycle

JD testifies that Gauthier had commented that he could not believe his luck. He told her that he had to put up with her at the office and with his spouse at home: both were on their menstrual cycle at the same time. She avers that she did not understand how he knew that she was on her period. She did not "advertise it" and it was not visible to anyone. The odd time, she might have reached into her purse for medication or held her back or her tummy. She believes the only way he would have known is if he had been "staring" at her while she was working. JD says she pretended that she did not hear him because she was embarrassed by his comments. That incident occurred around June/July 1993. Gauthier gives evidence on this issue as well.

Gauthier states that he does not recall making any comment to JD about menstrual cycle at any time. He states: "it is not a subject for anyone to talk about at any time." However, he recalls that on one occasion, around October 1993, it was necessary to retain the services of a plumber to fix a clogged toilet. The plumber dislodged feminine napkins from the toilet. So he told JD "not to use the washroom for that kind of stuff." In cross-examination, Gauthier avers that he might have made the similar request of Ms Daniels, but he was not sure.

Ms Daniels does not recall any such conversation with Gauthier. Nor had she heard him speak to JD about her menstrual cycle. She said, "it's not something I'd be listening for."

Hair Style

JD testifies that both Respondents made comments about her hairstyle. Gauthier commented that she "looked sexier" with her hair down than in a ponytail. Emilien enquired whether she had slept in and did not have enough time to style her hair. He told she had looked "nicer: the day before when her hair was not in a pony tail." They made those comments often. She told them that she did not appreciate being told how to style her hair. Sometimes they would laugh at her or echo her reply. As a result, she began to wear her hair in a ponytail more often.

Gauthier avers that on one occasion while he was reviewing the mail JD asked him: "how do you prefer my hair up or down?" He replied that it was not concerned whether she wore it up or down. He states that she had repeated the question and he had replied that he guess it looked better down and he went to his office with the mail. Gauthier said that there was no other occasion that he made comment to JD about her hairstyle.

As noted above, Adamcik asserts that he had heard comments, mostly from Gauthier, about how JD should wear her hair.

Ms Daniels states that she had never heard Gauthier speak to JD about her hairstyle.

Comments About Her Style of Dressing

JD avers that both Respondents asked her to wear mini skirts to work. Emilien had asked her whether she was wearing trousers because she had not shaved her legs. JD's evidence is that on one occasion, Gauthier had commented that it would help to expand his clientele if she would wear mini skirts. In response, she told him that she did not appreciate being told how to dress because she was a grown woman. They merely slighted her response. She says that she felt cheap. She felt like a play toy for them or some sex object for their personal entertainment. JD says she decided then to change her work attire. Henceforth, she began to wear slacks and wear her hair in a ponytail. She did not know what else to do or where to turn. She had been in the workforce since age fifteen, but she had never been exposed to sexual harassment at work. She says she did not know what her rights were and did not know how to handle the Respondents.

Gauthier testifies that JD enquired about UTR's dress code. He did explain to her that the business environment was dusty, so it was her choice what to wear. She had asked him if skirts or trousers were okay. He had replied that trousers were more appropriate. He states that in his view, JD was not dealing directly with the public. So, it did not matter whether she wore expensive clothes. Most of the staff wore jeans. He states that around April/May 1993, employees expressed an interest in wearing uniforms. He agreed because it made the company look like it was established.

Gauthier denies telling JD to wear mini skirt or what clothes she should wear to work. His evidence is that on one occasion, at the instance of JD, the issue of office dress code was discussed. In response to JD's question about dress code, he told her she should wear what she felt was appropriate. He comments that most of the times JD wore skirts and proper dress trousers, but he never told her what to wear.

Invitation to Sit on His Lap

JD states that there are two specific occurrences that are indelible: a request to sit on the Respondents' lap and comments that she was always cold at work because she did not have a man at home to keep her warm. JD asserts that both Respondents asked her to sit on their "lap to discuss what would pop up first." That happened frequently. JD says she understood "popping up to be referring to their penises." The Respondents thought it was funny and laughed about it. When it happened the first couple times, she pretended that she did not hear them. When they made the comment again, she informed them that she was there to do her job and she had a chair of her own to sit on. She states that she felt embarrassed and humiliated. The work environment was uncomfortable because the comments were continuous even though she had made it clear their behaviour was unwelcome.

Gauthier states that he never invited JD to sit on his lap. He relates that on one occasion, around September 1993, he and his father, Emilien, were in his office planning a hunting trip. The door was closed and they were listening to the radio. There was a discussion on the radio about lap dancing. They thought the discussion was funny because they did not know anything

about lap dancing. He asserts that the door of his office opened and he saw JD. She said that she knew what lap dancing was. She "kind of demonstrated by dancing near the door way. So it was kind of humorous." She did explain "a little more in detail" how lap dancing is done. He says at that point they talked about the first thing that pops up. He asserts that it was not directed at JD, but it was an explanation of what lap dancing is. He says he thought it was "pretty weird" that she could just come in and tell them about lap dancing. He says he asked JD to leave his office and he and his father continued their discussion about hunting. He states: "I never invited [JD] to sit on my lap."

Emilien recalls the lap-dancing incident. In sum, his evidence is that he recalls being in his son's office with the door closed when JD opened the door and entered. She tried to demonstrate a lap dance. He said he had seen lap dancing on T.V., but does not recall if it was before or after this incident. At the time though, he did not know what lap dancing was. He explains and demonstrates at the hearing what JD had done when she had tried to demonstrate lap-dancing. He states that she was just "waltzing around…there was no sexual gestures involved."

A Man to Keep JD warm

JD asserts that both Respondents made comments about her being cold because she did not have a man at home to keep her warm. Both would say they had already told her where she could "come to keep her warm." Both knew about her personal circumstances: that she was separated and involved in a custody battle with her estranged spouse. They brought in a small space heater that she placed under her desk. It was not helpful because she was still cold every day, especially when the heating system at UTR had malfunctioned.

In response to their comments, she told Emilien that the "fruit did not fall far from the tree." JD states that she was "fed up at that point – extremely frustrated." On one occasion her father visited the office. Emilien said to him that his daughter does not like the way we joke with her. JD states that she stood up, looked at Emilien and said, "neither would the Labour Board approve of [your] comments." She recalls that he just laughed and went back to the shop. She

had mentioned the OLRB because she had made telephonic communication with that entity as well as the Commission towards the end of October 1993. The Board summaries below the evidence concerning her contact with those entities under the caption "Communication with the Commission and the Labour Board."

Oral and Written Levity

The Commission and the Complainant submit into evidence *Exhibits 4, 5, 6, 7* and *8* to buttress their evidence. Those exhibits are caricatures or cartoons, prose and quotations that depict levity. JD believes the exhibits were received at UTR via the facsimile. Specifically, she state that Gauthier received *Exhibit 4* – "*Workplace Hazardous Material Information – Material Safety Data Sheet Woman - A Chemical Analysis*", dated October 29, 1993, via the facsimile and showed it to her. In turn, using UTR's letterhead, Gauthier sent it to Wendy, the secretary of the entity that had shared space with UTR. On the coversheet, he indicated that the it was from he and JD: (*Exhibit 4*). JD protests that she did not give Gauthier permission to use her name. JD avers that after Gauthier had showed it to her, he made several copies of it and put a copy in the male washroom. On the advice of the Commission, she took a copy as part of the process of documenting discriminatory incidents.

Exhibit 5 "Hands Across America" (dated November 25, 1993), is a cartoon depicting very crude sexual levity. JD says it was on Gauthier's desk when it first arrested her attention. Gauthier asked her to come to his office. The cartoon was on his desk. He referred to it and asked what she thought of it, or if she liked it. JD avers that she told him "it was disgusting and stuff like that shouldn't be here." JD avers that a copy of it was left on her desk. She thinks that Emilien was present at the time.

JD believes that Gauthier left *Exhibit 6*, "The Rules: The FEMALE always makes *The Rules"* on her desk around fall 1993. He would ask her whether she liked what he left her. JD avers that she had informed Gauthier that such "stuff should not be left on her desk and it should not be in the workplace. JD states that she found *Exhibit* 7: "Blonds" and *Exhibit* 8: "Sexual Misconceptions", on her desk. She believes that either Gauthier or Emilien left them there

because either or both had enquired whether she saw or liked them. Furthermore, JD asserts that only herself, Ms Daniels, Gauthier and Emilien had access to and frequented the main office area.

JD states that several times she had spoken to Gauthier and Emilien about the unseemly sexual paraphernalia. She states stridently that she was "very angry that they did not honour [her] previous request…to stop leaving these things on [her] desk." Also, she told them, more so Gauthier that she did not wish to clean the washroom because of the repugnant sexual paraphernalia that were posted there. They refused to remove them.

Adamcik avers that although he is not able to identify any of the exhibits, Gauthier and Emilien were aware that sexual paraphernalia existed in the workplace. They "might have had the odd caricatures of a sexual nature in the male washroom." There were pictures and calendars of sunshine girls posted on the walls and toolboxes or "anywhere that was not dusty where the tape would stick…even in the spray booth." He states that he and Gauthier brought them in and some could have come in by facsimile: but he does not know if Emilien brought in any. And Adamcik says that the "boys" made comments about the sunshine girls "as guys will do." He states that he does not know whether JD saw the sexual paraphernalia, but he knew she cleaned the bathrooms, including the male washroom. He states that JD had never expressed concern to him about any of the sexual paraphernalia.

Gauthier's evidence is that sometime in November 1993, JD showed him *Exhibit* 5: ("Hands Across America'). He states that JD had picked up the facsimile and was offended by it. He was out of the building when the facsimile arrived. He says a customer sent it to him. Immediately after JD showed it to him, Gauthier asserts that he called the customer and told him that he, was displeased and asked him to refrain from sending such facsimile to him again. He states: "I totally agree it was offensive." He does not know what JD did with the facsimile. However, with respect to *Exhibits* 4: ("Workplace Hazardous Material"), he might have seen it in another law suit, but he categorically denies ever seeing *Exhibits* 6 – ("The Rules"), 7 – ("Blonds"), 8 – ("Sexual Misconceptions") and 9 – ("OHR Declaration of Management Policy") before this hearing. The only document Gauthier avers he saw posted at UTR related to the

Workers' Compensation Board policy concerning injury. It was mandatory to post that document in the office together with a "code book".

Ms Daniels testifies that JD "teased around" with all the boys." She states that when the "guys" from the shop visited the office, JD and the guys would tell funny "off-colour jokes", laughed and chased each other around. The "guys" included Adamcik, who Ms Daniels avers was JD's boyfriend. Ms Daniels states that often, JD was the joke-teller: not Gauthier. Ms Daniels states JD would chase the "guys" out of the office and back into the office. Ms Daniels avers that at no time when JD had visited and returned from the shop had she complained to her about the pictures she had seen there. She recalls that usually JD returned from the shop laughing.

When the Board asked what was an "off-colour joke", Ms Daniels elucidated that "it's one that has sexual overtones…" She states that she was unable to recall any because she had not committed any to memory.

Defence counsel asks Ms Daniels whether she had seen any other kind of jokes with sexual overtones in the office. She replies that she did not recall seeing them in the "actual office", but she had seen "sexual things" in the shop and the shop bathroom. She recalls that they were "cartoon type things cut from newspapers or magazines." In her view, they were not "hard core stuff". She does not recall any of the exhibits shown to her except *Exhibit 7, "Blondes"*. She recalls "Blondes" because it has been around for a long time and she had seen it many places other than UTR. Also, she had seen pictures of women in the male bathroom.

In cross-examination, counsel for the Commission asks Ms Daniels whether she recalls saying to the Commission's investigation, on April 29, 1999, upon being asked why JD would have filed a harassment claim, that it was because JD was young and it is harder on the young to handle "kibitzing" in the office. She replies, "I don't even remember this conversation. I can't comment on it."

Holt gives evidence on behalf of the Commission and JD. Holt has extensive experience in human rights in the private and public sector that includes over sixteen years with the Commission. She held various positions, including regional manager, at the Commission.

Holt testifies that she was asked to investigate this matter sometime in October/November 1998. Among others, she contacted Gauthier, who gave her the names of several people, including Ms Daniels, who had worked for UTR. Holt states on April 27, 1999, she telephonically interviewed Ms Daniels, as opposed to an in-person interview. She did not consider Ms Daniels a critical witness with respect to the specific allegations. She deemed it appropriate not to send Ms Daniels a copy of the recorded interview for verification. As was her custom, however, she made notes of the interview. Essentially, the notes are Ms Daniels' answers to her questions, which were verbatim as much as possible. The notes became part of the official file record. Counsel for the Commission entered the entire interview to buttress Holt's evidence: (*Exhibit 27*).

Holt testifies that she prepared the questions in advance of the telephonic interview. She tailored her questions to get a sense of Ms Daniels' impression of the work environment. She had recalled that Ms Daniels was the "accountant" and part of the complaint was about JD's work performance. Also, part of the complaint was about jokes in the workplace. She wanted to find out whether Ms Daniels knew of jokes in the workplace.

Counsel for the Commission asks Holt what Ms Daniels had said when she asked her why JD would file a harassment complaint. Holt states that Ms Daniels had replied that the only thing she could think of was "because [JD] was young and [it] is harder on the young to handle kibitzing." Counsel asks Holt what did she perceive the term "kibitzing" meant. Holt states that she understood it to mean that there were office jokes, but they were not directed at JD: (*Exhibit 27, p. 3*). Counsel asks Holt what she understood Ms Daniels meant by "it's harder on the young to handle kibitzing." Holt states that she understood Ms Daniels meant there were sexual jokes that were not directed at JD, but it was harder for JD, as a young person, to deal with it. Holt states that Ms Daniels told her that she had never seen JD being harassed. She did not know

what happened when she was not at UTR. But JD was "always smiling - joking until the day she was being laid off. She had never seen an angry side of JD."

Sexual Advances or Solicitation

JD alleges that there were numerous incidents of sexual advances by Gauthier or Emilien or both. There was touching of her shoulder, waist and hip, touching of her legs and even the insertion of Emilien's hand under her skirt and disrobing JD's panties. The incidents are set out below.

Touching Incidents at the Photocopier

More specifically, JD avers that at times when Gauthier was going to or from the washroom, if she was standing at the photocopier, he would put his hand on her shoulder, waist or hips. Other times he would retrieve the document she was faxing or photocopying and would touch her. She asserts that there was no legitimate reason for him to touch her. For even though the passageway was small, there was enough room for him to go to and from without touching her. JD asserts that she asked Gauthier to stop. At times he would ask what he was doing wrong – trivializing her concerns. She declares that this gratuitous touching began in September 1993 and continued until her termination January 20, 1994.

Gauthier denies categorically ever touching JD's hips or waist as a sexual gesture. He recalls once he placed his hands on her shoulder to console her. He avers that he had returned to the office around 11:00 to 12:00 hours and found JD crying at her desk. He had leaned over, put his hand on her shoulder and asked her what was the matter. JD had told him that her son had not been put on the school bus. He had responded by asking her why she was still at work instead of going to find her son. He asserts that he had permitted JD to leave at once.

Emilien gave a categorical denial of all alleged sexual improprieties and deigned not to answer this allegation.

The Touching Incident while Painting

JD relates that UTR decided to move its offices from the second floor of the building to the first floor. Around the September 4, 1993 weekend, in preparation for the move, Gauthier and Emilien asked for volunteers to help paint the main floor offices. JD volunteered. On the day of the painting, while she was in a bent position she observed Emilien had come close to her. She had been speaking to him and stood up. She felt was Emilien's hand on her shoulder and within seconds, "Emilien had ran his hand from the top of [her] shoulder, along [her] back and squeezed [her] buttock." JD avers that Gauthier and Adamcik were present. The latter confronted Emilien and told him that his behaviour was not appropriate. Her recollection is that Emilien laughed and went to the shop. JD avers that when he left she spoke to Adamcik about the incident. She recalls that she was still in shock. After a brief break, she continued to paint although she felt uncomfortable and "felt like she was a play toy for their entertainment."

Adamcik relates that around early August 1993, he was coming upstairs towards the office to get estimate sheets and work orders. He observed Gauthier reaching down JD's shoulder, running his hand down her back and then touched her buttock. He avers that JD seemed like she was trying to pull away and possibly slightly embarrassed. She looked disturbed. He did not hear a verbal response from JD. It was obvious to him that neither JD nor Gauthier was aware of his presence. No one else was present. He asserts that he did not say anything because he did not want to embarrass either one.

In cross-examination, Adamcik avers that it was Emilien and not Gauthier who he had observed touching JD. He states that he adopts his statement given to the Commission in January 1994. He concedes that he was incorrect only in so far as the perpetrator and approximate time he says that the incident occurred.

Gauthier recalls that sometime in September 1993, Emilien, JD, Adamcik and he were painting the office. He does not recall seeing JD upset at any point while painting. He recalls that at some point while he, JD and Emilien were painting Adamcik joined them. Previously,

Adamcik had been painting a truck in the shop. Around dusk, Adamcik and JD "had a paint fight." He was upset because they were making a mess and he told them to stop. They cleaned up the mess and then left together.

Emilien denied categorically that he touched JD. He argues that he denies ever touching JD on September 14, 1993 in any way. He submits that he cannot remember if he was at UTR: most likely he was in Parry Sound because he never spent ten days at any time in Toronto. He submits that Adamcik could not have seen him touch JD because it would have been impossible to see anything from the door around the corner.

Emilien's Hand up JD's Skirt

JD relates another incident that occurred around September 14, 1993. Gauthier and Emilien, his father, were sitting in the reception area. (From her position, she could only see part of Emilien). There was a discussion among the three of them. She was asked to come into the reception area. She entered the reception area and stood close to where Emilien was sitting. Instantly, Emilien inserted his hand under her skirt. She "tried to pull away from him and moved backwards. His hands went even further up my skirt and then my underwear was pulled down." JD asserts that she was "shocked and stunned at the same time."

Simultaneously, she observed the door from the shop opening and Adamcik was entering. She felt very embarrassed because she was basically being undressed before three men: Gauthier, Emilien and Adamcik. JD states, "I didn't believe what was happening. I started to fix my clothes. My face was burning: I could feel it. I was red in the face…my eyes were filling up with water and I ran into the bathroom" and tried to fix her clothes. As she ran to the bathroom, she heard Adamcik asking Gauthier and Emilien why she was fixing her clothes.

She relates that she remained in the bathroom for a while. She was crying a lot. While she was in the bathroom, she heard laughter and Adamcik's voice confronting Gauthier and Emilien. She thought about leaving the building, but she knew if she left she would not have a job. Because of her custody battle, she had to keep her job. Finally, she returned to her

workstation. JD asserts that Gauthier and Emilien were still sitting where they had been before and both were "laughing hysterically." When she glanced up, she observed Gauthier wiping away tears from his eyes. Embarrassed, JD did not confront them then. She remained at her desk and worked for the rest of the day. She avers she had puffy eyes for the entire day. She felt sick, humiliated – she felt like a toy. The incident was degrading. She could not eat lunch. At that juncture, she did not know how she was going to return to work the next day. JD asserts that she was even more embarrassed because some employees had observed her puffy eyes and red face, even though they did not discuss what had occurred.

JD states: "It is very difficult for me. Even to this day when I think about what they did, I can still hear the laughter. That is why it is so painful for me to go through this again. It is very wicked and cruel. The outfit that I wore that day still hangs in my closet. I have never worn it again after that day." Notably, during this part of her testimony, JD was so visibly embarrassed and tearful that a break was requested to allow her to regain her composure.

Adamcik testifies that this incident happened on the Labour Day weekend, September 4, 1993. UTR had taken over the entire building. That weekend was set aside to paint it. JD, Gauthier, Emilien and Adamcik were present. He had left briefly and when he was returning, just around the hallway, he observed Emilien's hand under JD's skirt. He avers that Emilien looked up with a smile on his face. JD looked "quite disturbed and embarrassed. She was straightening herself out and run to the bathroom which was off the kitchenette." He had entered from a door that leads directly into the foreman's office. Emilien and JD hid Gauthier from his view, but he believes that Gauthier knew about the incident.

He declares that JD seemed shocked, embarrassed, angered and very disturbed by what had happened. He yelled at Gauthier and Emilien: "what the f... you think you are doing?" Both just laughed. He asked the question again and they just laughed. To his recollection, JD left shortly after the incident. He had no further discussion with either man. He did, however, speak to JD afterwards. She told him she was quite concerned and she would call the Commission to enquire how to stop those incidents.

Specifically, in cross-examination and reply, Adamcik conceded that the sequence of the incidents concerning the touching of JD were incorrect. He states that the statement he gave to the Commission January 27, 1994, is more accurate than his account of events at this hearing. He clarified that this incident did not occur on Labour Day during the time they were painting, but at later time. He asserts that Emilien was the person who had groped JD's buttocks when he was ascending the stairs to obtain estimate sheets and work orders. Also, Emilien was the person who had inserted his hand under JD's clothes at the later date. He says that besides those discrepancies, his evidence is consistent with the statement he gave to the Commission on January 29, 1994.

Gauthier denies categorically witnessing this incident. He recalls on one occasion he observed JD was upset and ran into the washroom. He did not know why she was upset. It was not the first time he had observed her upset. He avers that three to four minutes after JD went to the washroom, Adamcik came into the office and asked him where JD was. Emilien was in his office as well. When Adamcik entered the office, Emilien was telling him a joke and they were both laughing and snickering. At that point, Adamcik suggested that they had done something to JD. He states that Adamcik went to the washroom and knocked on the door. JD came out and went to her desk and Adamcik spoke to her for about five to ten minutes. Gauthier said he has no idea what they spoke about: "it was none of [his] business."

Emilien states stridently, that concerning "sexual harassment: there never was any." He states that as for the evidence about the alleged September 4, 1993 incident, "I think you got fed a line of bull." He avers that on that day, JD had worn a pair of "tight blue jeans." Gauthier had painted his office, JD had painted her office and he had painted the reception and hallway areas. He states that the day was uneventful except a paintbrush fight between JD and Adamcik and all laughed about it. Emilien asserts the first he heard of sexual harassment allegations was when JD launched her civil suit. He states that the allegations were concocted after Adamcik was fired. All the time he knew JD, he enjoyed good relations with her. He asserts that he has been married for fifty-six years and had never had a charge or an accusation against him.

The Torn Pantyhose Incident

JD relates that on November 25, 1993, she had caught her pantyhose on the filing cabinet. She was sitting in her office. Gauthier had been in his office with Brad Maitland, the shop foreman. They left Gauthier's office and were partially in the doorway area. Gauthier and Maitland, more so the former, noticed the run in her nylons and Gauthier proceeded to touch her ankle and to trace the run up her leg. Also, Brad bent down and pointed at her ankle. Gauthier had asked her to allow him to help change her nylons. She was very angry and very upset and told them not to touch her. They were laughing. JD asserts that she had pulled back and asked the men to not touch her. Adamcik had come into the office from the shop at that juncture. The next thing that followed was an argument between Gauthier, Maitland and Adamcik.

She states that Adamcik had demanded to know why Gauthier was bending down and touching her leg and why was Maitland bending down. Adamcik was very angry. He was yelling at both men that he did not want to see them touching her any more. Both men tried to justify their behaviour by using humour. Gauthier was trying to tell Adamcik that it was JD who had drawn attention to her torn nylons and that she was responsible for what followed. Gauthier sent Maitland back to the shop. Adamcik and Gauthier went into the latter's office and closed the door. It was close to the end of the day. JD states that she signed out and left the office.

The next morning Gauthier called her into his office and informed her of his conversation with Adamcik. He told her that Adamcik "had let him have it." He said Adamcik had told him he did not want to hear any more comments or see any more touching of JD. JD asserts Gauthier said, "boy, is he jealous of you." JD asserts that she had commented that it was about time someone spoke to him other than herself and that such behaviour should stop because other people had begun to notice his behaviour. JD avers that Gauthier told her that the shop was his and he could do as he wanted and that anyone who did not like what was going on, especially Adamcik, could get out. She asserts that she felt terrible. Attending work daily had become unbearable. She just hated the thought of going to work daily, but she had no choice. In addition, she was having a difficulty eating and sleeping.

JD states that she did not consider Adamcik's intervention as jealousy, but a compassionate response. She regarded him as a big brother. JD avers that she was a very close friend of Adamcik's younger sister since kindergarten. Their friendship had flourished and extended to both sides of their families. JD and her family visited Adamcik's parents and relatives often. Although they knew of each other before, she came to know Adamcik as they met when Adamcik visited his parents. It was during one of those visits he informed her that UTR was looking for a secretary.

During cross-examination Emilien suggested to JD that Adamcik was her "boyfriend". He asked her what was the relationship between her and Adamcik. JD replies that they were just friends. Emilien submits that they were dating and that when they visited his cottage they slept in the same bed. However, JD's evidence is that she slept in the tent with the children.

Adamcik's evidence is that around late November 1993, he observed Maitland and Gauthier standing outside JD's office pointing at a run in her nylons. Also, he saw them touching JD's calf. He became quite angry and asked them to stop. He threatened to put Gauthier through a plate glass window. He warned Gauthier if those incidents did not stop, Gauthier would have to deal with him. Also, he avers that he spoke to JD about the "touching and stuff" that had occurred. She told him that she had called the Commission and a woman would be calling him. He had observed JD was becoming quite distressed and distraught. She seemed more and more withdrawn which was quite different from her disposition. He asserts that he threatened Gauthier because he felt responsible for JD. He had gotten her the job and she was a family friend.

Adamcik's relates that shortly after that incident, (about three to four days after he threatened Gauthier), in early December 1993, he was fired. He asserts that Gauthier never gave him a reason, but he believes it was because he had threatened Gauthier's. He says he cannot think of another reason except he did not get along with the new manager named Van Doorn. Van Doorn had informed him of his termination. He says he was angry about being fired. He had worked at UTR for a year. He thought it was unfair, especially because Van Doorn was not a body man and worked about one hour daily.

Gauthier testifies that sometime around late November 1993, while sitting in his office, he heard "lots of yelling and arguing" coming from JD's office. It had gone on for about ten minutes. The noise had interrupted a conversation he had been engaged in with a customer. He opened his office door and saw Maitland in JD's office, JD was sitting at her desk and Adamcik was leaning over the "vestibules" looking at them. Gauthier says he was upset because "this was supposed to be a workplace." So he asked: "what the heck was going on." Maitland informed him that JD had torn her nylons in the shop area and they were arguing over who ought to pay for her nylons. Gauthier states that Adamcik told him that he, Gauthier was going to pay for the nylons or else. Gauthier states that he felt Adamcik's tone of voice objectionable "because he worked for me." So he told Adamcik to "shut up" and that he would not pay for the nylons because JD was not suppose to be in the shop. Gauthier avers that at that point JD lifted her legs in the air and he pointed to the run in JD's nylons, but he did not touch her. At that juncture, Adamcik said that one way or another Gauthier would pay for it. Gautier avers that at that juncture, he ordered everyone back to work and the matter ended.

Maitland evidence is that he does not recall exactly when he began working at UTR, but had worked there for one and a half years. He had worked at UTR during the time JD had worked there. He started as a body repairer and within three months he was promoted to shop foreman. He assumed Gauthier's responsibilities for the shop when the latter was away.

He recalls only, albeit vaguely, the incident when JD had a run in her nylons. He had gone to the office to see Gauthier. He found him in JD's office. The latter was sitting at her desk. She was "making a lot of commotion about a run in her stockings" and was asking who was going to pay for her nylons. Maitland says he was about eight feet away from JD. He says he recalls at the time that JD was making a lot of commotion over a pair of stockings. He recalls that he returned to the shop and shaking his head in amazement that there had been such a commotion for a minor situation. He does not recall anything else.

When asked what he meant by "commotion", he states that there was not a lot of screaming or yelling, just that JD and Gauthier were talking at the same time without listening to

the other. He states that there were no other voices to be heard or individuals present at the time of the "commotion".

Contact with the Commission and the OLRB

JD testifies that towards the end of October 1993, the frequency of vulgar jocularity and Gauthier's and Emilien's unrelenting unseemly behaviour heightened her concern to seek help to cope with her work situation. She had been "attacked twice" by Emilien and she was concerned for her safety. Besides, she was the only female employee in the building. She did not look forward to going to work, but she knew she had to work. She did not know where to turn: whether to contact the police or the OLRB. She began to make enquiries and ended up at the Commission.

JD states that on her initial call, she spoke to a woman who identified herself as Kiran Uppal ("Uppal"). During the first contact, she explained to Uppal her situation at work and the difficulties in her personal life. At that juncture, Uppal advised her to document incidents, and how to handle uncomely or unwelcome behaviour. Among other things, JD avers that Uppal had informed her that sometimes employers do not react very well to a complaint and she could lose her job. Based on the conversation with Uppal, at that juncture, she decided not to file a formal complaint. She made notes of Uppal's advice during their conversation. She began to document incidents and began to tell Gauthier and Emilien that she did not appreciate the way they treated her. Also, she started to record past incidents from her recollection: (*Exhibit* 12).

JD states that she had several contacts with Uppal before she decided to file a formal complaint with the Commission. In subsequent calls to the Commission, JD says that she would ask to speak to Uppal. By the time she was terminated, she had had two in-person meetings with Uppal: one around late November to early December 1993 and another on January 4, 1994. At the first in-person meeting, she had obtained Code Cards and pamphlets from Uppal and from the Commission's reception area, and Uppal's business card: (*Exhibit* 9). JD avers that she posted the Code Cards at UTR, but they disappeared. She states that Uppal had repeated her advice, i.e., to document incidents and to verbalize to the perpetrators that their behaviour was

unwelcome. At the second meeting, JD states she was distraught. Uppal had repeated the same advice and told her there was nothing more she could do for her unless she was willing to file a formal complaint. Uppal gave JD her home telephone number and told her that she could call her after hours if she needed. JD avers that she continued to follow Uppal's advice, but by January 19, 1994, she had had enough. She states that she just could not go into work that day.

At that juncture, she had decided to allow the Commission to make contact with UTR. She telephoned Uppal from home. She told Uppal she was "physically sick because she could not stomach [the harassment] any more." She told Uppal she was ready to let the Commission contact her employer. She states that although initially she was afraid she would lose her job, she became stronger and more determined to make a formal complaint. She wanted her work environment to improve. She gave Uppal permission to contact her employer. She knew Uppal would make contact with her employer during the day of January 20, 1994.

Commission Intervention Culminated in Dismissal

JD testifies that on January 20, 1994, JD returned to work. She was at her workstation when she took a call from Uppal. She informed JD that she was about to discuss her case with her employer. Uppal asked whether she was ready and she told her yes. She transferred the call to Gauthier and informed him that there was a call on hold for him. Meanwhile, she called Adamcik on his cellular telephone and told him "it's going down." Adamcik replied that he would be at UTR as soon as he could.

JD states that about 11:00 hours she overheard Gauthier telling Uppal that he wanted to go into his office. She thought it was odd because he was in his office from the outset of the telephone call. She avers that Gauthier put the call on hold, left his office, passed her workstation and went into the foreman's office. There, he resumed the conversation with Uppal. JD avers that Gauthier's voice began to get louder and then she heard him shouting. She began to get concerned for her personal safety because of the tone of his voice and his choice of words. She overheard Gauthier yelling to Uppal that she was fired and that her termination was pre-planned. She overheard him saying also, to Uppal, that she could not speak to JD because JD did

not work at UTR any more. She had glanced over at the telephone and saw that the only two out-going lines were lit up. She became extremely afraid. JD states that she felt it was quite odd that both lines were in use at the same and the timing of both lines being in use. She postulates that Gauthier had intentionally tied up the other line to prevent her from calling out.

JD states that she overheard Gauthier reiterating to Uppal that her performance was poor and that her termination was pre-planned. JD avers that was the first time she had heard that her job was in jeopardy. JD asserts that Gauthier was livid. He was "cursing and swearing." He entered her office and told her that her services were no longer required, that her "performance was not up to par" and she was being terminated. JD says that she asked him where were the letters informing her that her performance needed improvement. His response was: "… pack up your things and get out…you stupid bitch." By that time, Gauthier was standing between JD and her office door. He was "extremely angry." She was afraid because of his body language. She was shocked at first by his rage and name-calling. She regained some composure and demanded her termination papers and then proceeded to clean out her desk.

Meanwhile, the telephone rang. As she was reaching over to answer it she noted Van Doorn was in the reception area. He picked up the telephone and began to speak. She heard him saying "no you can't talk to her…she doesn't work here any more…she's already left the building." JD declares that at the juncture, she believed she was "in trouble because [she] was the only female in the building." Panicked, she began to scream for help: "Hello, hello, who ever you are, they won't let me leave the building." In her view, her exit to leave her office was blocked. There was only one door. Gauthier was standing in front of it. The only other option was to stand on her desk and jump through the wicket: Van Doorn was standing there. He was still speaking on the telephone.

Eventually, Van Doorn gave her the telephone said the caller wished to speak to her. The caller was Uppal. JD says Uppal told her she was calling back to find out if she was okay because Gauthier had denied her many requests to speak to her. Uppal asked if she was okay. She told Uppal she was not because two men were blocking her office and that she was fired. Uppal advised her to get into a public area where other employees were. She told Uppal that she

was instructed to clean her desk. Uppal instructed her to call the police if she was not allowed to leave. After speaking with Uppal, she continued to collect her belongings. She went to the filing cabinet, took her purse and two cheques made payable to two shop employees, namely: Barry Hunt and Kevin Metcalfe and left.

Meanwhile, Adamcik had arrived in the building. JD states she took her typewriter and her chair, and walked towards the shop. She gave the cheques to Barry Hunt and Kevin Metcalfe. At that point, Gauthier came into the shop and asked her "what the hell are you still doing here?" She told him she was giving out the two cheques and that she was leaving. JD asserts that she told Gauthier that she had filed a complaint with the Commission and he had erred in firing her. Gauthier threatened that if she did not leave the premises, he would call the police.

Adamcik testifies that the day JD was terminated she had called him. He was just leaving his parents house. He made it to Oakville "in record time." When he arrived at UTR, he saw JD in her office in tears. Gauthier and Van Doorn were standing in front of her door. Brad Maitland was in the hallway. He states that JD had called him and said that she had been fired and was not allowed to leave the office. She was "totally distraught" when she called him. He avers that JD was fearful for her life. He asserts that upon arriving at UTR, he went directly to JD's office, took her chair (she had her own personal chair because of a bad back) and her other belongings and left.

Adamcik testifies that JD had a couple of cheques that she proceeded to give to "the guys" on her way out. He does not recall whether there was any oral exchange between Gauthier and any one else. He "was very angry that JD was in that state and he had to come to get her." He stresses that he believes JD was terminated because she made a complaint to the Commission. He recalls that JD had told him that she had contacted the Commission to see if there was any recourse or if someone would call her employer to say there would be a complaint if the untoward behaviour continued. Also, he recalls JD had told him that she had called the Commission and an officer would call Gauthier on a particular day.

Uppal's Evidence

Uppal gives evidence for the Commission and the Complainant. Currently, she is employed with the Bank of Nova Scotia as a Diversity Manager. The tenure of her employment with the Commission was April 1992 to February 1995 as an Intake Officer. In that capacity, during 1993-1994 she worked in its Mississauga office. Her duties included telephonic and walk-in enquiries from people who felt they were discriminated against in the workplace and wished to know whether their situations fell within the *Code*. In addition, she dealt with employers' enquiries about their duties and rights under the *Code*.

Uppal explains her process. Generally, on receiving an enquiry, she would inform the caller of the options available, including filing a formal complaint. She did not take notes for every enquiry. For instance, she did not take notes if the caller was anonymous or if the enquiry was general in scope. On specific enquiries or informal complaints, she would speak to Human Resources personnel of the alleged perpetrator or directly to the employer. She might attempt to resolve the matter by contacting the alleged perpetrator, relate the nature of the complaint and try to educate the person about the *Code*. No liability was attributed at this stage. This process was called Early Settlement Initiative ("ESI"). ESI was mandatory if a complainant wished to file a formal complaint. If ESI was not successful and the complainant wished to do so, a formal complaint would be initiated against the alleged perpetrator.

Uppal asserts that enquiries or informal complaints concerning sexual harassment were handled differently. That is due to the potential severity or severity of such incidents. For example, they could result in rape or the like. When someone called concerning sexual harassment, she would enquire about his or her safety and security. She wanted to be satisfied that the complainant was not alone or otherwise vulnerable to attack. She would advise the person to make notes and document incidents, she would advocate that the person vocalize to the alleged perpetrator that his behaviour is unwelcome and to ensure that the behaviour is communicated to the employer or the alleged perpetrator. If the caller were still in the workplace, she would explain the potential consequences. Often the caller would enquire about

possible outcome. She would give advice based on her experience in dealing with other cases: for example, tension in the workplace or termination.

Specifically, Uppal recalls, to the best of her knowledge, that around September or October 1993, JD did contact the Commission. She states that JD did explain the situation at her workplace and asked whether that constituted harassment, and what she could do about it. Also, she enquired about the process. Specifically, Uppal recalls that JD had related allegations that she averred she had experienced at UTR that Uppal felt were serious: for instance, "groping, touching, sexual banter and jokes based on [JD's] breast and backside." Uppal recalls advising JD of her options including informing her employer that the behaviour was inappropriate. She advised JD if she was not ready to file a complaint, she should make notes and document incidents noting the dates and times they happened. She did ask JD whether the company had Human Resources personnel and JD said there was none.

Uppal states that JD enquired about the consequences if she were still in the workplace if the Commission exercised its ESI and formal complaint process. Uppal says that JD did not want to file a complaint on her initial call to the Commission. She gave JD her name and telephone number, advised of the time period in which she should file a formal complaint if she wished to do so. Also, she explained the complaint process to JD.

Uppal says she met JD in person around November/December 1993. JD related additional incidents. JD did bring in sheets of paper: they could have been written levity. Uppal says she gave JD a copy of the Commission's policy and information on sexual harassment. Again she advised JD to document incidents, informed her of the complaint process and gave her a business card: (*Exhibits* 9 (a), (b) and (c)). Uppal could not recommend a lawyer, but gave JD the telephone number of the Lawyer's Referral Service. In addition, she gave JD her home telephone number: (*Exhibit* 10). She heard from JD again on January 19, 1994.

During that conversation, JD related more serious allegations that could have been attributed to harassment, e.g., "come sit on my lap and see what would come up." Uppal says she asked JD what she wanted to do. JD replied that she wanted to pursue a complaint because

the harassment had not stopped. Uppal avers that she informed JD about what would happen next, e.g., the ESI process. She informed JD that she would contact her employer to inform them of the allegations, but would call her to let her know when she would be calling the alleged personal perpetrator.

Uppal asserts that on January 19, 1994, she took notes of her conversation with JD. As well, she took notes during her conversation with Gauthier when she contacted him on January 20, 1994: (*Exhibit 22*). The purposes of her notes were to keep a record of the complaint, especially because it was sexual harassment, to record the ESI attempt and its outcome, which was necessary if a formal complaint would be filed later. Uppal admits that the notes, particularly those of the January 20, 1994 contact with Gauthier, were "not the best notes…They are sloppy" because of the confrontational nature of the telephone call and the quickness in which the matters unfolded. As well, she does not have good penmanship.

During cross-examination, she refuted the allegations that she recorded the incident in March 1994. She said the formal complaint was filed February 9, 1994. She had no involvement with the case after that time.

Uppal's ESI Attempt

Uppal states that on January 20, 1994, she called and spoke to Gauthier. She informed him of the allegations JD had leveled against him. She recalls Gauthier being "angry and confrontational" in that he told her immediately that he was going to fire JD, so what she was saying did not matter to him. She says Gauthier denied the allegations except for "sexual bantering" that he avers was consensual. She did ask to speak to JD. He refused. At that juncture, she informed him of the relevant requirements of the *Code.* He repeated that JD was being fired "today" because of poor performance or lateness. She admits that she is not sure whether he said "performance", but she is sure that he said he was firing JD. He said JD did not know that she would be fired that day. She informed Gauthier of the requirement of the *Code.* Then she asked again to speak to JD. Gauthier refused.

Uppal asserts that she was concerned that JD would have problems leaving the office because the matter had become so confrontational. So, she waited about ten to fifteen minutes and then she called back to talk to JD. She wanted to tell JD that her employer was aware of her allegations. She got the impression that JD was not allowed to come to the telephone because the male person who answered the telephone said that JD was not there. But on a clarification question from the Board, she says she does not recall now whether it was Gauthier or another male person who made the comment. She recalls hearing JD's voice saying, "you are rude or ignorant."

Eventually, she spoke to JD and informed her that she had spoken to Gauthier and that the ESI was unsuccessful. During this call JD informed her that she was fired. Uppal states that later that day, in the afternoon, she called JD again to see if she was safe. She does not, however, recall the conversation. Subsequently, she spoke and met with JD to formalize the complaint, and to discuss the process and possible remedies. In addition, she contacted Ms Gauthier on January 27, 1994, and advised her that a complaint had been filed and enquired whether it was possible to try to resolve the matter. Ms Gauthier told her that she would contact her to resolve it, but she heard nothing further after that contact.

Finally, Uppal opines that the time frame of this complaint was "relatively quick." She drafted it relatively quick because, based on her experience of other complaint, it was a "severe sexual harassment complaint." Up to that point, she believed she had handled more than twenty sexual harassment cases. She has used parts of this case in education sessions in the private sector as a template for discussions on sexual harassment behaviour.

Gauthier's Evidence

Gauthier testifies that he was in his office when JD came to his door and told him a woman from the Commission wished to speak with him. He was surprised because he did not know anything was wrong. He went to the foreman's office for more privacy. The caller identified herself as Uppal from the Commission's office. Uppal told him she was calling because JD had made a complaint of sexual harassment against him. Uppal continued to list the

complaints. About five minutes into the conversation he said: "I would like to explain something to you. It really does not matter that she is making these complaints because I don't know of any complaint that I received from her." He continued by explaining to Uppal that a week previously he had held a meeting with his Operations Manager, the Bookkeeper and the Foreman and a decision was taken to terminate JD's employment on January 20, 1994.

Gauthier testifies that Uppal asked him why JD was being terminated. He replied briefly that JD's work performance had been poor and that she had been disrupting the shop. He says Uppal interjected and said he was going to fire JD because of "this 'phone call, is it not?" He states that he tried again to explain to Uppal that a decision had been taken previously to terminate JD's employment and that the Operation Manager, Van Doorn, could confirm it. Gauthier said, at that juncture, Uppal exclaimed: "he's going to lie for you." He states that he got "pretty annoyed at her response." Meanwhile Van Doorn had appeared. He told Uppal that Van Doorn was present and asked again if she wanted to talk to Van Doorn. Uppal reiterated: "he would lie for you."

Gauthier testifies that Uppal asked him directly what he was going to do about the allegations. He told her that it really did not matter because he had already decided to fire JD on the Friday. Gauthier avers that at that juncture, Uppal asked permission to speak to JD to inform her that she had been dismissed. He refused to allow her to speak to JD. He told her that if anyone would inform JD that she was fired, he felt it was his job since he was the employer. He avers that at that juncture, Uppal insisted on speaking to JD. In response he said to her: "...you give me no choice but to go over and release her from her duties at this time." He had reiterated to Uppal that Van Doorn was in front of him and would confirm that it had been pre-determined to fire JD. He then passed the telephone to Van Doorn and proceeded towards JD's office. He says he suspected Uppal had hang up because he saw Van Doorn in front of JD's office.

Gauthier asserts that he stood in front of JD's office and "asked her very calmly: can you please pack your personal items- I am relieving you of your duties as of now." He avers JD said to him: "you can't fire me." Meanwhile, the telephone rang. Van Doorn reached over through

the opening and picked up the telephone that was located in JD's office. He heard Van Doorn say: "no you cannot talk to her." At that juncture, JD yelled to the top of her lungs about three times: "someone help me. They're gonna hurt me." Gauthier asserts that he was still standing in front of JD's office. He was about four to five feet away from her. He states that immediately he left the doorway walked towards Van Doorn, asked him to take care of the situation and then he left the building. He says Van Doorn did not respond – he just stood in front of JD's office. He went outside to the front of the building, for about ten minutes, because he thought that the incident would have become worse and that JD's temper would flair up. Subsequently, upon returning inside, he heard JD yelling: "f…ing bastard is going to pay, pay and pay. He just fired me." He says he left the building again because he did not want to get into a confrontation with JD. He allowed Van Doorn to take care of the situation.

Van Doorn's Evidence

Van Doorn testifies that he does not know whether anyone called the Commission or the Commission called anyone. Nor does he recall any incident when the Commission's representative had called or the caller was from the Commission. He avers that he recalls a few things. Van Doorn recalls an occasion when Gauthier had been upset and angry after a telephone call. Gauthier was pacing. He was agitated. He would not say Gauthier had lost his temper. Van Doorn says he is not sure, but he thinks that after the telephone call, Gauthier left. He says he was standing in the doorway of JD's office, about five to six feet from her. JD was standing while she was talking with someone on the telephone. This was after Gauthier had held the private meeting with her. He did not know to whom JD was speaking, but he had assumed that it was someone from the OLRB or the Commission. He believes he had said loudly, so that the person on the telephone could hear, that JD was not facing any threat and that she was free to leave. He does not recall whether he had called the police, or if the police attended. Vaguely, he recalls that police officers had attended. However, he recalls being shocked by the telephone conversation JD was having and the charade he had witnessed because there was no indication before the telephone conversation that JD was in any trouble. He recalls that other than he, only Gauthier and JD were present.

Van Doorn does not recall being present at a meeting or discussion when Gauthier decided to terminate JD. As noted above, he recalls that Gauthier had held a "private meeting" with JD about terminating her employment. He avers that before Gauthier had spoken to JD, Gauthier had told him that he intended to terminate JD that day. He states that Gauthier held the meeting with JD before she spoke to the person on the telephone. Also, he remembers that while JD was speaking to someone on the telephone and he was in the hallway, she was saying in a "frantic tone of voice: 'I'm scared. You got to get me out of here. They're going to hurt me'."

Van Doorn was asked why she would have made such exclamations. His response is that at the time he "thought that she should be teaching acting classes" because no one was threatening or yelling at her. He avers that he recalls saying to Gauthier that "two things must happen here: Maurice you need to get out of here and somebody better call the cops because it looks like she's trying to set you up."

Post-termination Incidents

The Missing Cheques

As noted above, JD asserts that she had taken two cheques from her filing cabinet payable to Barry Hunt and Kevin Metcalfe. She went to the shop and gave the cheques to them. At that point, Gauthier came into the shop and asked her "what the hell are you still doing here?" She told him she was giving out the two cheques and that she was leaving.

JD believed Gauthier had held back their cheques out of spite because there were contentions between he, and both employees: all other employees had received their pay cheques. The actual payday was January 17, 1994, which covered the period from December 27, 1993 to January 9, 1994. She confesses that at the time, she had decided to give the employees the cheques because she was angry about being fired and because of the way in which Gauthier had spoken to her. She states: "I know I was wrong to take the cheques out of the office area, but at that point in time, I didn't care."

Gauthier testifies that about twenty to twenty-five minutes after he had told JD she was fired, he returned to the building. Van Doorn informed him that JD had taken cheques from the filing cabinet and distributed them to employees in the shop and then left. He stopped all work in the shop and asked everyone that whoever had received cheques from JD must return them. He says no one returned the cheques. Upon checking the filing cabinet, JD's and Adamcik's last pay cheques and about four or five others were missing.

Gauthier concedes that in this particular pay period some employees had received pay cheques. Others were held back because they decided to wait until the following Monday. Usually, JD distributes the cheques around midday on payday. Gauthier admits that he does not know when the NSF cheques were presented to the bank. Further, he admits that he does not know if the four or five NSF cheques were from employees to whom he had given their cheques on January 17, 1994 or those to whom he alleges JD had distributed pay cheques on January 20, 1994.

Gauthier avers that he had asked the other employees to not cash their cheques until the following Monday or Tuesday because he did not have enough money in his bank account. He says that the employees ignored him and the cheques were returned NSF. He postulates, however, that JD had distributed four or five cheques because about four to five cheques were returned NSF. He comments that there was not enough money in the bank to cover those cheques because he was unable to collect enough receivables.

The Two Cheques Payable to JD and Adamcik

JD recalls that her last regular payday was January 17, 1994, but she did not receive her pay cheque until January 18, 1994. JD avers that Gauthier had instructed her to prepare a cheque for Adamcik as well as the regular payroll. Gauthier had reviewed the payroll for that period as he always did. On January 18, 1994, Adamcik, who was no longer working at UTR, came in to pick up the cheque for his last job. They had decided to cash their cheques at Money Mart at Highway 10 and Dundas Street. She states that the net amount of her cheque was $906.41. As a

result of cashing her cheque at Money Mart, she lost 2.9% ($26.29) plus $1.59: so she received a net of $878.53: (*Exhibit 11*).

JD avers that shortly after her termination, she received a telephone call from a woman named Lynn from Money Mart. Lynn informed her that the cheque she had cashed at that entity on January 18, 1994, was returned NSF. Also, Lynn told her that another cheque from UTR was returned NSF. Subsequently, she received a letter from Money Mart demanding reimbursement of both cheques (hers and Adamcik's). If she did not reimburse Money Mart, it would take legal action against her. JD avers that she "pleaded with Lynn" not to pursue her, but to go after UTR who issued the cheque. Also, she told them that UTR had fired her and she was going through a hard time. JD asserts that around April 1994, a woman who had identified herself as Wendy from Money Mart called and informed her that UTR had honoured the two NSF cheques.

JD avers that there were always problems concerning payroll and pay cheques. Gauthier would hold back certain employees' cheques because he did not have enough money in his bank to meet expenses. Also, he would use employees' pay cheques as a manipulative tool. Or, he would tell employees to go to Money Mart, as opposed to his bank so that he would buy time to collect enough money to clear outstanding cheques.

Adamcik testifies that when Gauthier terminated his contract, Gauthier owed him money. He attended UTR around December 1993 to get it. He recalls attending Money Mart with JD to cash the cheque. He believes the amount of the cheque was $920, but less than $950 because it was less than a week's wages. He avers that Money Mart has never contacted him about an NSF cheque. However, JD had informed him that Money Mart had informed her that the cheques were NSF.

Gauthier asserts that on January 20, 1994, he discovered that, among others, JD's and Adamcik's cheques were missing. He avers that during the meeting that had been held a week before, a decision was taken that Ms Daniels would prepare a pay cheque for the correct amount as well as JD's separation papers. Gauthier admits that the only cheques for which he had demanded stop payment were JD's and Adamcik's. He asserts that the rationale for the stop

payment on JD's and Adamcik's cheques was because JD had prepared the cheques and had exaggerated her work hours.

During cross-examination Gauthier admits that the payroll would have been prepared sometime within January 12 and 17, 1994. He states that JD had given him the payroll including the time cards for his review and for him to sign the cheques. Usually, he would review the time cards for accuracy, sign the cheques and return them to JD. However, at a meeting on January 12, 1994, a decision was taken not to give JD her pay-cheque. For this particular pay period, after reviewing the time cards and signing the cheques, he had put the cheques and time cards in the filing cabinet in JD's office. He avers that he intended to make changes to JD's pay cheque at a later time.

The Commission presented Gauthier with evidence that those cheques were cashed on January 17, 1994, and asked how could they have been taken on January 20, 1994. He replies that the cheques were taken before January 17, 1994: he found out they were missing on January 20, 1994, but he does not know when they had been taken. He reiterated that on January 12, 1994, it was determined that JD had been exaggerating her work hours and that was tantamount to theft. Therefore, she would be terminated on January 20, 1994.

Delay in Giving JD Her Termination Papers

JD states that when Gauthier dismissed her, he failed to give her the required severance documents and her final cheques. She called the offices "almost every day" to find out when she could receive her termination letter, severance pay, ROE and her final pay cheque. Each time she called she was given the runaround. Eventually, Gauthier and his sister, Ms Gauthier, told her they were ready. So, on January 28, 1994 she attended UTR, accompanied by her father, to pick up her termination documents. She avers that she was given the ROE and shown a letter that indicated that she had received all moneys owing to her. She was asked to sign the letter. She refused. When she asked Ms Gauthier to find out whether her final cheques were ready, Ms Gauthier informed her that she could not see them because she had refused to sign the letter. Also, Ms Gauthier commented that certain documents were with UTR's lawyer.

JD testifies that on February 1, 1994, she received her "termination package": (*Exhibit 14*). Also, she was shown a letter (the one Ms Gauthier had shown her on January 28, 1994, of the said date), a second letter dated January 20, 1994, (the termination letter) and a third letter explaining the adjustments relating to her last pay cheque that she had cashed on January 18, 1994. Gauthier had made deductions with respect to her last pay cheque, her final severance pay cheque and her vacation pay.

Gauthier avers that to his knowledge, Ms Gauthier had called JD on January 24 or 25, 1994, and had informed her that her record of employment ("ROE") was ready. He avers that he did speak to JD as well on January 26, 1994, and had informed her that her ROE and final pay cheque were ready since a couple of days ago. He avers that he "personally gave her [his] guarantee that [they] were there waiting for her." He recalls that JD attended his office with her father on Monday the 28 or 29, 1994. Although he was not in the office, the documents, which comprised the "letters explaining why the cheque was not the same as expected, her ROE, a cheque and there might have been something else," were ready.

When asked why his personal guarantee was necessary, he replies that JD believed that "we were lying to her that the documents were ready." He says he guessed JD waited until January 28, 1994 to attend his office to pick it up. However, he states that he does not dispute JD's note inscribed on the documents that she had received the documents, in person, on February 1, 1994, from Ms Gauthier: (*Exhibit 14*).

Expanding on the documents, Gauthier asserts that he had handwritten the January 20, 1994, letter on that said day. It was to "officially" inform JD why she had been terminated. Ms Gauthier, who had commenced work on January 23, 1994, had copy-typed the letter. He postulates that Ms Gauthier could have dated the letter January 20, 1994, because that was the date he had inscribed on his handwritten draft. He avers that the January 28, 1994 letter had been prepared by Ms Gauthier and the bookkeeper, Ms Daniels, after consultation with the company's lawyer. He avers that he read the letter and then signed it. He avers the purpose of the letter was to explain how and why he had made certain deductions from her cheque and to explain how the cheques that JD and Adamcik had cashed at Money Mart "which were cashed

on January 17, 1994" affected her final pay cheque. He admits that the sum of the deductions equals the total of the two cheques cashed by Adamcik and JD.

Ms Gauthier testifies that she was not employed at UTR when JD was terminated. She states that between October and December Gauthier had asked her to consider working for him. At that time he did say that he wanted to "let go" JD because she was "not able to do her job." She states, "in bookkeeping it is crucial to do things properly." She states that Gauthier had decided to terminate JD after Christmas. She recalls the discussion occurred at the family Christmas dinner. She began working at UTR after JD was terminated.

Ms Gauthier recalls typing JD's letter of termination. She avers that there was no written draft from which she typed. She states: "Maurice never wrote a draft letter and gave it to me to type." She composed the letter from the notes she took from speaking to their layer, DeRousha's secretary. The secretary told her what to write and how to word it. She believes the letter was faxed to the secretary to ascertain its content. She recalls there were many calls between UTR's and DeRousha's offices. The "lawyer was concerned that the letter had in the key words."

She recalls receiving calls "perhaps daily" from JD who was asking for "things beyond her control." JD was told at one point to come pick up her paper work. However, she is not sure if the ROE was ready, but the cheque was not ready. She recalls JD refusing "to sign something." The next day she returned and received her papers. She does not recall JD signing the letter, but it is probable that JD signed the letter in her presence.

JD Removed from Premises by Police at Employer's Behest

JD asserts that Gauthier had told her it would be ok to attend UTR on March 1, 1994, to pick up the balance of her documents, including her T-4. On March 1, 1994, when she arrived the documents were not ready. She says that it was the third such visit she had made to collect her documents. Ms Gauthier informed her that Gauthier was not there. She asked Ms Gauthier to call Gauthier. She noticed Van Doorn was in Gauthier's office. Ms Gauthier and Van Doorn had asked her to leave the premises. JD states that she refused to leave without her documents and sat in the waiting area.

Shortly afterwards, Gauthier arrived with two police officers: a male and a female. Both went into Gauthier's office. Subsequently, the female officer came out and spoke with JD. JD asserts that the officer did not treat her kindly or politely. The officer rudely demanded to see her identification and then demanded that JD destroy certain old documents that were in JD's purse. JD complied. She was given a letter, asked to sign it, and then given a photocopy of it: (*Exhibit 16*). JD says the police did not lay any charge against her. Nor was she told why the police were called. She left without her T-4. She was told that Gauthier had mailed the T-4. She did confront him then and asked him why did he tell her it was ok to come pick up the documents.

Adamcik testifies that he visited UTR with JD after she had been told to come in to pick up either her Employment Insurance ("EI") or Tax documents. When they arrived, the document was not ready. JD refused to leave without it. He says he had words with Gauthier about a uniform that was misplaced or not returned and Gauthier called the police. When the police arrived, they went to Gauthier's office. The female officer was in Gauthier's office for a "considerable length of time." When she came out she conferred with the male officer and then "proceeded to treat [JD] like a criminal." They were "extremely rude" to JD. They told her to shut up and threatened to charge her with trespassing.

Gauthier testifies that around later February 1994, JD called and enquired when she could have her T-4. He confirmed it was ready and invited her to pick it up. When JD attended his office, he was out. He says he received a call from Ms Gauthier stating that JD and Adamcik were in the office and had been harassing her and had been trying to remove some office supplies, which they claimed were JD's belongings. He says at the time, he instructed Ms Gauthier to call the police and to give JD her T-4. He says upon arriving at the shop, he met two police officers. He and Ms Gauthier spoke with an officer separately. Ms Gauthier did inform the female police officer that JD and Adamcik had been harassing her. Gauthier avers that he had explained to the male officer that he did not wish to have any dealings with JD or Adamcik and that any further contact should be done through legal channels. In addition, he asked the police to prohibit them from entering the property. Gauthier states that the police advised him to compose a letter informing JD and Adamcik that they were not permitted to enter the property

again or they would be charged with trespassing. He did compose such a letter and gave it to JD and Adamcik about thirty minutes after the police had arrived at UTR. The letter is dated March 1, 1994: (*Exhibit 16*). After JD and Adamcik had accepted the letter, the police escorted them out of the building.

Ms Gauthier testifies that all T-4s were ready by the government deadline, i.e., the end of February 1994. However, she does not recall whether JD's T-4 was ready when JD visited UTR. She says she does not recall anything specific about the T-4. Ms Gauthier concluded that "whatever was done was what I was instructed to do by Maurice."

Emilien's Relation with UTR

JD testifies that she conducted a business search at the Ministry of Consumer and Corporate Relations to verify the scope of the business relations between Gauthier and Emilien. She says the records indicate the names of both of them: (*Exhibit 2*). In addition, she states that both told her that they were owners of UTR.

She avers that Emilien attended UTR about five to ten days monthly. His visits were sporadic, but when he came to Oakville he would visit UTR. Emilien did not attend the office frequently during the colder periods. She states that in November 1993, she did not see him that frequently. He asked her questions about inventory of supplies. He enquired why certain vehicles were being worked on as opposed to others and the like. He directed employees and told them what to do. He would physically work in the shop. "There were times when Gauthier was absent and Emilien was holding down the fort," JD states. To her knowledge, employees had told her they had argued with Emilien and he had told them if they did not like how UTR was being operated they could leave. Also, she states that Emilien had related to her that he had had arguments with employees and had made similar remarks to them. JD avers that there were many such arguments. Often, Emilien would boast to employees that it was his money that made it possible for them to have a job and that his last name was on their pay cheques.

JD avers that she used to write cheques payable to Emilien. She was not sure whether the money was to repay the "loan" or if it was for wages. Several times Emilien had complained to her that he had not received his payment for the loan.

Adamcik evidence is that generally, Gauthier was responsible for mundane administration of the office. When Emilien was around, which was once weekly, "he was the big boss." Adamcik avers that Emilien liked to boast that he was the person who funded the business. He states that when the shop opened initially, Emilien attended five to six days at a time and then he would stay away for three weeks or so. When the shop began to run smoothly, he attended about once monthly. Usually, he would have coffee with the "boys". When he attended the shop, he helped anyone with duties that required physical labour: for example, re-aligning doors and helping to load or unload a vehicle. In addition, he would give advice or instructions to Gauthier on how he thinks the business should be run.

Gauthier testifies that he began UTR in March 1993. His father, Emilien, gave him a $25,000 loan towards the business. Emilien's name was added as a partner to protect his investment. Around March 1993, the business was registered as a partnership: he and Emilien signed the registration: (*Exhibit* 2). He says that he managed the business until October 1996. He asserts that Emilien had asked him to remove his name as owner of the company. By August 1993, after consulting with Emilien, he spoke to a lawyer to establish the entity as a sole proprietorship. Effective October 27, 1993, UTR amended its status and became a sole proprietorship. Gauthier became the sole owner. UTR's name changed from 1047222 Ontario Limited to Ultimate Truck Repair, Paint and Collision Limited: (*Exhibit* 2). Emilien held an interest in the equipment to protect his investment. He decided to reimburse Emilien the $25,000 investment by paying him in $1000 monthly installments. That arrangement did not satisfy the loan.

When Gauthier was confronted with the fact that he had admitted in his Statement of Defence and Counterclaim, in a civil matter, that Emilien "is a partner with his son, Maurice T. Gauthier…and has never been an employee," he refused to answer the question on the basis of solicitor-client privilege. He agrees that the corporate records do not indicate the monetary

agreement or transaction between he and Emilien. Neither Gauthier nor Emilien has provided his accounting records to the Commission or this Board.

Gauthier testifies that UTR manifested cash flow problems by late September 1993. He attributes the problem to the timing of Accounts Receivables from customers. Instead of collecting receivables in thirty days, the entity ran into sixty-day collection. He hired a bookkeeper who came in two to three days weekly. He became directly involved in collecting the receivables. Those changes showed improvement in early 1994. The employees were paid regularly. All the suppliers were paid, but there were problems with the government regarding the PST and GST. Late in October 1996 the government was instrumental in closing down the business because it owed over $60,000 in back taxes and penalties to the provincial and federal government. The government seized the entity's assets the landlord locked the door and held the equipment and all the company's files. He retrieved the documents in early spring 1997.

Emilien testifies that in March 1993, he loaned his son, Gauthier, $25,000 to begin a business. Although he acknowledges that the Business Name Registry Certificate shows that he is an owner: (*Exhibit* 2), he asserts that he was never a partner. He states that he used to travel from Parry Sound two to three days at a time to help his son. On visits, he had installed a paint boot in the shop and assembled equipment in preparation of the opening of the business.

On one occasion when he visited, he become aware that most of the invested capital had been depleted and Gauthier was having difficulty meeting his expenses. He began to help Gauthier by doing tasks about the business when he visited about twice monthly up to August 1993. Specifically, he had collected receivables when Gauthier had asked him to do so and had worked on trucks sometimes. Also, he would speak to employees about the work they were doing. However, the business was still not improving.

On a particular visit in August 1993, Emilien observed much waste mainly on the painting of trucks. Customers were disenchanted because of the poor workmanship. He asserts that he was disillusioned. He informed his son that he was getting out of the business. To that end, he communicated with his lawyer and instructed him to draft the requisite documents to

release him from the business. At that juncture, the lawyer drafted a chattel mortgage on all equipment of UTR so that in the event of a problem, the assets would be his. (N documentation was entered to support this evidence). Emilien testifies that after October 1993, he did not return to UTR except to bring JD's father on a hunting trip.

On cross-examination Emilien admits that he did visit UTR several times in September 1993, and he did visit UTR periodically until October 1993. He admits that during those visits he was involved in UTR's business for two to three hours daily and sometimes more. He denied monitoring employees' performance: but he did engage in discussions about their work.

FINDINGS OF FACTS

The Board heard evidence for twenty-two days, led by ten witnesses, concerning incidents that allegedly occurred between JD and the Respondents during 1993 and 1994. The above "Summary of Evidence" evinces incongruous and contradictory versions. The Board finds no one party's version of the incidents is veracious. This controversy is not solely the result of the passage of time. There is little doubt that there were times when witnesses were either economical with or embroidered the veracity of their evidence. (The Board defers a broader discussion about the individual witness' credibility).

It is settled law in Human Rights litigation, that the Commission and the Complainant must meet the civil evidentiary burden to establish a *prima facie* case. "A *prima facie* case…is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in a complainant's favour in absence of an answer from the respondents-employer:" (*O'Malley v. Simpson-Sears Limited* (1985), 7 C.H.R.R. D/3102 (S.C.C.)) at p, D/3105, at para. 2476). The civil test is ***on the balance of probabilities: not an air tight case."*** (*Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (Fed. C.A.) at p. D/14, para. 7): (Emphasis added).

In embarking on this exercise, the Board is mindful of the credibility guide articulated in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357.

> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what [the witness] has seen and heard, as well as other factors, combine to produce what is called credibility…The test must reasonably subject [the witness] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be in its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions.

Accordingly, the Board examines the consistency of *all* the evidence to determine whether it is in "harmony with the preponderance of the probabilities which a *practical and informed person* would readily recognize as reasonable *in that place in those conditions*." (Emphasis added).

Overview of UTR's Milieu

To understand "that place and those conditions," it is helpful to give a compendious backdrop that existed at UTR at all relevant times of this matter. The Board finds that the general work environment at UTR was slack and crass. The employer and his agent failed to exercise their legal and moral authority to implement and to foster a healthy work environment. In certain circumstances, the Respondents abrogated their legal duties to their employees. Instead, they used their managerial authority to foster a poisoned work environment. Snippets of the evidence is illustrative of the Board's conclusion.

Gauthier states that there was consensual sexual bantering between him and JD. JD demonstrated lap dancing for Gauthier and Emilien. In the presence of his father, Gauthier invited JD, to sit on his lap to see what will pop up. They enjoyed it. Neither deemed it crucial or appropriate to chide JD. Adamcik and the "boys" had their sunshine girls pinned up in every place where the absence of dust allowed it. There were "kibitzing" and "off-colour" jokes with sexual overtones. Gauthier and Adamcik brought in sexually explicit paraphernalia in the work place. Gauthier showed JD a rather crude sexually explicit paraphernalia and asked her if she liked it. Emilien pulled down JD's underwear. There is no evidence before the Board that

management took any action to prevent such incidents. In the end, JD sought help from the Commission because of the alleged unwelcome conduct of Emilien and Gauthier.

Against that backdrop, the Board finds that the stories are inconsistent, even though it renders some of the evidence more credible than others. The incongruity of the parties' and some witnesses' evidence almost renders the guidance given in *Faryna, supra,* unhelpful. In this case, the intricate exercise of "findings of facts", begs a very keen Solomonic analysis in determining the veracity of the evidence led before the Board.

The Board makes findings of facts concerning JD's work performance, gender discrimination and sexual harassment and solicitation, JD's dismissal and the Respondents relations with UTR. The calibre of JD's work performance goes directly to a justification Gauthier advances for dismissing her. Thus, a careful analysis of JD's work performance is significant to a determination on the ground of reprisal. Also, the period Gauthier asserts that JD's work performance began to deteriorate has a link to the time JD avers she began to tell the Respondents that their conduct towards her was unwelcome and her initial contact with the Commission.

But, "*in that place and in those conditions*", JD's work performance cannot be viewed globally for the eight months she was employed at UTR. Therefore, the Board examines her work performance through three aspects namely: (a) JD's Employment Relations and Job Duties; (b) Pre-September/October 1993 Performance Appraisal; and (c) Post October 1993 Performance Appraisal. Each aspect is discussed below.

Work Performance

<u>JD's Employment Relations and Job Duties</u>

First it is necessary to determine the scope of JD's job duties. Based on the evidence above, the Board finds that Gauthier hired JD on or about May 31, 1993 as a receptionist/secretary. The Board is satisfied that although Gauthier was the protagonist-employer, JD reported to Emilien whenever he visited UTR or when Gauthier was absent or

both. Further, the Board is satisfied that JD held the reasonable perception that Emilien was in a position of control and she was not in a position to refuse his direction.

Although JD's duties were not defined by a formal job description, the Board finds that implicitly, Gauthier and JD had agreed that she would perform the related clerical duties including payroll tasks, for which she was to receive training. Officially, JD's duties did not include any accounting related or bookkeeping tasks, except for payroll and "sorting out paper work for the bookkeeper." Notably, Gauthier concedes that he did not hire JD to do bookkeeping duties.

The Board finds that JD was required to clean the bathrooms and make coffee. The Board is satisfied that there was neither an implicit nor expressed agreement in the oral employment contract which required JD to clean the men's toilet, the sink, the floors and pick up the garbage. In the Board's view, Gauthier assigned those tasks to JD based on gender stereotypes and myths about women's work. That, no doubt, marginalized JD's personhood. The Board accepts JD's evidence that she *tolerated* those tasks because, "she was grateful for a job."

The Board finds that at the onset Gauthier hired JD on a part-time basis, but required that she worked a forty-four hour week. That did not change when she became a full-time employee on July 19, 1993. Her wage was increased from $10 to $12 hourly.

The Board is satisfied that Gauthier allowed or tolerated JD's flexible working hours as recorded in *Exhibit 1*. He accepted the way in which she recorded her hours and determined the wage that was due her. Although JD was responsible for preparing the payroll and cheques, ultimately, Gauthier was responsible for verifying, approving and signing the payroll and pay cheques.

Pre September/October 1993 Performance Appraisal

The Board finds that JD had received performance appraisals or feedback about her job performance from Gauthier, albeit informally. That practice is not at all uncommon or unusual

in an unsophisticated small business milieu such as what existed at UTR. She received positive and negative feedback. The Board is satisfied that a positive informal performance appraisal led to JD's promotion and wage increase in July 1993. Gauthier's evidence that he added JD to his payroll because he became nervous by Ms Daniels' enquiry about JD being paid via "Triple A" is specious. The evidence is that JD was added to the payroll in July 1993. Ms Daniels did not commence her contract with UTR until November 1993.

The Board accepts JD's evidence that Gauthier and Emilien told her she was "doing a good job," and that she should "keep up the good work." In fact, Gauthier testifies that JD's "performance was fair in that she did her work "diligently", and was "courteous to customers." In addition, Gauthier testifies that he thought JD did the accounts receivable and accounts payable and bank balancing "very well."

Based on the evidence, the Board is satisfied that JD's job performance for the duties for which she was actually hired was acceptable. This is not to say JD's performance was perfect. In fact, JD's evidence is, although she did not fit every instance in a time frame, that the Respondents had chided her about certain behaviour, namely: personal telephone calls (that was around September 1993); taking messages to employees in the shop; misplaced invoices; lateness for work (in the morning and after lunch) on a few occasions; and attending an office meeting. JD expands on each point and states how she reconciled each problem with Gauthier. Gauthier evidence is consistent with JD's and, he does narrow it down to a timeframe, which is, around September 1993. Things changed after September/October 1993 – why? The findings of facts under this heading will focus on Gauthier's rationales for dismissing JD, namely: (i) JD's work performance; (ii) exaggeration of her work hours; (iii) disrupting the shop; and insubordintion.

Post-September/October 1993 Performance Appraisal

The Board finds that during this period, the duties for which JD received serious negative performance reviews, in the main, were outside the scope of her job. Those duties relate to the functions of a bookkeeper or an accountant. Also, during this period JD had contacted the Commission and the OLRB to seek help to deal with her situation at UTR. She had brought

back the Commission's Code Card(s) and its Policy on Sexual Harassment, as well as pamphlets from those places and had posted them in UTR's workplace. Quite likely Gauthier had some idea that JD was asserting her rights to be treated fairly. The Board accepts JD's evidence that during this period she began to tell the Respondents that their conduct toward her was unwelcome. Thus, it is reasonable to conclude that those factors caused Gauthier to become more critical in his assessment of JD's job performance and behaviour, informed his decision to terminate her employment.

Dealing specifically with JD's performance, Gauthier's evidence sates with incongruities. Moreover, his actions are inconsistent with the drastic step of termination he took ultimately. Gauthier avers that JD's performance began to deteriorate when she became full-time: around early September 1993, and continued through to December 1993. Her punctuality began to deteriorate around the first part of September 1993 and happened "pretty often about three times per week." He avers that he was not in the office, but Maitland, Van Doorn and Emilien had told him so. Also, he states that Ms Daniels told him about JD's poor performance. He avers JD had no reason to work late. Also, she had problems reconciling the bank statements, she failed to follow Ms Daniels' instructions and she began to disrupt the shop.

Emilien, Maitland and Van Doorn give evidence, but none corroborates Gauthier's story. Ms Daniels evidence corroborates part of Gauthier's evidence about JD's frolicsome or immature behaviour at work regarding her interaction with other employees. She says JD chased the men in the shop and chased them out of the shop. Also, her evidence supports Gauthier's with respect to JD's work performance. It is sufficient to point out at this that Ms Daniels' appraisal of JD's work performance was based largely on bookkeeping/accounting duties, which were not her normal employment duties. This point will be discussed later.

In the Board's view, Gauthier's actions were inconsistent with the degree of severity he placed on JD's work performance. Although he had spoken to JD about Ms Daniels' complaints, he took no further action. Moreover, he states that he did not give JD warning letters because "most of the errors were minor" and in the end her work "improved substantially" after their discussion. It is difficult to appreciate why Gauthier dismissed JD on the basis that her work

performance was poor if her errors were minor and she had improved substantially in the end. His choice of sanction was not proportionate to the insignificance he placed on "most of her errors."

Gauthier's evidence is inconsistent with Ms Daniels' evidence. Gauthier testifies that he did not put much weight on JD's job performance when he took the decision to dismiss her. Ms Daniels testifies that Gauthier had informed her that he intended to "lay off" JD. She avers that the "only" reason for Gauthier's decision to "lay off" JD was because she was not performing her job properly. She states that Gauthier was "going to try to be kind" to JD and classify her termination as a layoff due to lack of work.

Parts of Gauthier's and Ms Daniels' evidence about JD's performance reveals two salient points. First, it is obvious that Ms Daniels was not aware of JD's job requirements. Second, Gauthier and Ms Daniels based their assessment of JD's work performance heavily on bookkeeping/accounting tasks. For instance, Gauthier asserts that Ms Daniels had informed him that JD had failed to follow her instructions, in that, she failed to keep accurate records for accounts payables and receivables. JD had failed to record the proper information on the books: either the numbers were inaccurate or she entered the information in the wrong column. When asked what JD's job duties entailed, she replies that they included accounts receivable, accounts payable, payroll and sorting out invoices. Notably, Ms Daniels states that when she began working at UTR the problems she had with JD's performance were not serious. They became issues only when UTR began to take shape as a going concern. Ms Daniels opines that as a new company, it was important to hire someone who could have done accounting or bookkeeping functions.

Ms Daniels was not the only person who misunderstood JD's substantial job duties. Ms Gauthier testifies that Gauthier had asked her to consider working for him. She states that she didn't think it was anything specific, just that JD was not able to do her job. To that end Ms Gauthier, who had bookkeeping experience in a related industry, opines: "in bookkeeping, it is crucial to do things properly." It is apparent that Gauthier, Ms Daniels and Ms Gauthier deemed

bookkeeping, accounts payable and accounts receivable the dominant duties of JD's job. Thus, the Board disregards their criticisms of JD's work performance in this area.

Even so, by inference, Ms Daniels' evidence indicates that JD's errors, including her non-formal duties, were relatively low. She states that JD was not always careful in doing clerical duties in that about "once" weekly there was some problem. On "one occasion" the pay cheques had to be redone because JD had given her inaccurate information. On another occasion, some of the computation of sales figures had to be redone. Contrary to Gauthier's evidence, she states that JD did not do bank reconciliation because when she began to work for UTR she had all six months backlog to do. It should be recalled that Gauthier testifies that JD performed these tasks "very well." Also, it should be noted that JD had no previous experience or training in accounting or bookkeeping.

Implicitly, Gauthier blames the NSF cheques on JD's inability to keep accurate balance. He states that JD was responsible for keeping a record of the last ten transactions so that he would have immediate knowledge of his bank balance. Gauthier states that the key concern was to keep accurate balance so that he would not be embarrassed with NSF cheques when he needed to write a cheque. JD failed to keep accurate records of transactions with his bank. As a result, "the odd cheque bounced." The evidence is markedly incongruous with other evidence given by Gauthier. Specifically, Gauthier testifies that he could not blame JD for NSF cheques. He admits that from very early in the business he had a cash-flow problem. He concedes that he realized that he did not hire JD as a bookkeeper. Emilien, who identifies himself as an investor in UTR, testifies that before August 1993, Gauthier had a hard time keeping up with expenses.

The Board examines another rationale Gauthier puts forward for dismissing JD, that is, "exaggeration of working hours." The Board rejects Gauthier evidence that JD was exaggerating her hours. Moreover, the Board finds that justification is specious.

As noted above, Gauthier testifies that when he took the decision to dismiss JD, he "didn't put much weight on her lateness or the performance of her work. More emphasis was placed on the exaggeration of work hours…." Gauthier asserts that he had considered

exaggeration of working hours a major problem. He testifies that in early December 1993, he had learned from Van Doorn that JD was exaggerating her work hours.

Gauthier's evidence is that he did not inform JD that he suspected her of exaggerating her work hours or that he was monitoring her hours or that he intended to adjust her pay cheque to reflect the accurate number of hours that he believed she had worked. He did not issue a warning letter to her because he felt he had "more important things to do." There is no evidence before the Board that he kept a record of JD's attendance to buttress these allegations. Further, Van Doorn testifies that he believes Gauthier brought the issue to his attention. Gauthier gives no legal justification why on one day exaggerating work hours had such little significance in the business scheme of things and the next it was so grave that it warranted immediate dismissal. It is indeed a curious phenomenon that Gauthier failed to bring this "major problem" to JD's attention or took any steps to correct or deter her behaviour. The Board has grave difficulty in appreciating any rationale why Gauthier allowed JD to continue preparing the payroll and the pay cheques as usual and Gauthier continuing to review and sign them, up to the point of her dismissal.

Gauthier testifies that he had contacted the OLRB to find out what appropriate action he could have taken. The OLRB had asked him whether he had proper documentation to support his allegation. Also, his "legal contact" had asked him whether he had thought about dismissing JD carefully and if was the best option. The Board finds that Gauthier heedlessly pursued the option of dismissal.

In the Board's view, lateness relates to the allegation of "exaggeration of working hours". It is note worthy that from May 31 to August 31 1993, JD arrived at work only twice at 08:00 hours, thirty-four times after 09:00 and between 10:00 hours, and five times after 10:00 hours. She worked as late as 22:30 hours and on Saturdays and Sundays: (*Exhibit 1*). There is no evidence before the Board that at any time Gauthier had refused to approve and sign JD's pay cheque during that period. Thus, it is reasonable to conclude that during that time Gauthier accepted, condoned or tolerated JD's work schedule as an accurate record of her time worked.

By comparison, as at September 1, 1993 to January 19, 1994, JD arrived at work eighty-two times between 08:00 and 09:00 hours, nine times between 09:00 and 10:00 hours and four times after 10:00 hours. Also, *Exhibit 1* indicates that JD had worked many late evenings and on both weekend days. The exhibit indicates that on one occasion, she recorded and was paid for a fifty-eight-hour workweek. The Board notes that JD's initial starting time, as agreed by Gauthier, was between 08:00 and 09:00 hours. This exhibit bolsters JD's evidence that after Gauthier had chided her for lateness, she promised to make up the time and to be more punctual. It confirms Gauthier's evidence that when he had chided JD for lateness, he felt she understood why she had to be at work early to answer the telephone. But significantly, it refutes Gauthier's evidence that JD began to arrive late, "pretty often about three times per week" after September 1993.

The Board found that ultimately that Gauthier was responsible for approving every employee's work hours and signing the pay cheques. There is no evidence before the Board that Gauthier had refused to sign JD's pay cheque even though he avers he was told JD was exaggerating her hours. Nor is there any evidence that he gave JD oral or written notice that she should not work in excess of forty or forty-four hours weekly. As noted above, Gauthier not only continued to sign JD's pay cheques after he avers he was informed she was exaggerating her work hours, but he allowed her to continue to prepare the payroll and the pay cheques. Moreover, he signed her last pay cheque even though he claims he had taken the decision to terminate JD's employment around January 12, 1994, which is prior to or at the time the payroll was being prepared. There is no evidence before the Board that he instructed JD not to distribute the pay cheques for that period. Moreover, he placed the pay cheques in the filing cabinet in JD's office. The Board rejects Gauthier evidence that he intended to prepare another pay cheque for JD that would have reflected the accurate number of hours she had worked. It is difficult to find even an air of credibility in his justification. Based on the evidence, the Board must reject Gauthier's excuse that JD exaggerated her work hours as a mere pretext.

Another justification put forward by Gauthier for dismissing JD, is that she disrupted the shop. The Board finds that JD was indeed playful and often combined her telephonic duties with frolics - while delivering messages to the men in the shop. JD did not refute this evidence.

The Board is satisfied that the work environment in which JD worked, and that Emilien and Gauthier fostered was conducive to her frolicsome behaviour. It is quite odd and hypocritical of Gauthier to have dismissed JD for disrupting the shop when he abrogated his leadership role as an employer. The Board finds that he had not set any legal or moral boundaries in the workplace. According to Gauthier's testimony, he admits that he condoned and engaged JD in sexual bantering. Thus, the Board rejects this rationale and deems it a ploy. The Board has not overlooked that there is no evidence before it that any of the male employees with whom JD had frolicked was reprimanded or terminated because he disrupted the shop. Notably, JD and Gauthier state that her behaviour had improved after the latter had spoken to her.

Finally, the Board examines the rationale, that is, refusal to follow instructions of a superior. The Board finds that this too is a pretext. There is no evidence before the Board that JD had blatantly refused to perform any of her duties. While the Board is satisfied that JD made errors, Gauthier and Ms Daniels evidence is corroborative in that when spoken to about her work, JD was conciliatory or promised to do better. Further, Ms Daniels testifies that although she had spoken to JD about telephone etiquette, she felt it was not her responsibility to discuss JD's performance with her. She states "it would have been Maurice's: he was her employer." Moreover, the Board notes that Ms Daniels was an independent contractor. There is no evidence before the Board that she was an employee or part of the management scheme at UTR. Nor is there any identity of the superior to whom JD was insubordinate.

To recapitulate, the Board finds that the justification put forward by Gauthier for dismissing JD, namely: "exaggeration of working hours; disruption of the shop; poor work performance; and insubordination are clearly specious. The Board's findings on this issue are the underpinning and correlates with its factual findings under the ground of reprisal.

Discrimination based on Gender, Sexual Harassment and Solicitation

The general slant of Emilien's and Gauthier's evidence is to depict JD as a dishonest, incompetent, mendacious, experienced and loose young woman who relished coarse sexual levity and whose motive is to use the Commission's and the Board's processes for monetary

gain. The general thrust of the theory of JD's case is that she was a callow, hardworking, honest and vulnerable young woman who was sexually harassed by the Respondents. Neither party was able to persuade the Board that either thrust genuinely depicts the conduct of the conduct of the parties or what really occurred.

The Board analyses the evidence of JD, Adamcik, Emilien, Gauthier, Ms Daniels, Van Doorn and Maitland under these grounds. The Board does not deem any of these witnesses entirely credible or reliable. Throughout the entire proceedings, the Board had a distinct impression that those seven witnesses were, in different degrees or shades economical with the truth or embroidered the truth. However, looking at the evidence quite broadly, and tiptoeing through the prickly field of evidence, the Board has culled snippets of stories that seem to have an air of truth or reliability. The Board concludes that generally JD's evidence seems more credible. Below the Board expands on its general findings concerning credibility and reliability.

The Board's reservations about JD's credibility arise initially from her failure to rebut specifically Gauthier's evidence that there was consensual sexual bantering. While consensual sexual bantering does not negate her allegations, if not challenged adequately or persuasively, raises doubts about the credibility of her other evidence. Also, it lends credence to Gauthier's evidence that she initiated conversations about her hair, her breast size and her style of dress, and the lap-dancing incident. In the Board's view, lap dancing is not just sexual bantering: inherently, it is a gross form of priapism whether JD engaged in sexual gestures in her demonstration. The second concern arises from JD's failure to challenge Ms Daniels' evidence that she was often engaged in "off-colour" jokes with sexual overtones. The third concern arises from JD's nonchalant rebuttal of the evidence that her relationship with Adamcik was not plutonic. Notably, counsel for the Commission put that in issue. JD, albeit unrepresented, had time and opportunity to rebut this evidence, especially after Gauthier and Emilien raise the contrary view. In the Board's view, this is a significant variant in her evidentiary style on other issues in this matter.

The Board's reservations about the veracity of Adamcik's evidence have direct relevance to credibility as well as reliability, whether he is indeed an independent witness, and whether part

of his evidence should be disregarded or if regarded, what weight, if any, the Board ought to give to it. From Adamcik's mannerism during his testimony, there seems to be a degree of resentment and animosity towards Emilien and Gauthier. In general, even though the salient parts of his evidence seems to be consistent with JD's, the Board has a distinct impression that he was a scripted witness, who from time to time, forgot his cue and who was economical with the truth or embroidered his evidence or both. To that extent, it raises doubts about the credibility and reliability of his other evidence.

In examination-in-chief, Adamcik denies that he had an amatory relationship with JD. During the cross-examination of Ms Daniels, the Commission's counsel sought to impeach Ms Daniels' credibility by challenging her evidence on the ground that it is inconsistent with a prior statement she had given in April 1999, to Ms Holt, the Commission's investigator: (*Exhibit 27*). During examination-in-chief of Ms Holt, the Commission's counsel entered the entire statement Ms Holt had taken from Ms Daniels. (The Board defers discussing its relevance to its concern about Ms Daniels' evidence). In that statement, Ms Daniels had informed Ms Holt that JD told her that she was dating Adamcik and that they were planning to be married. Whether that evidence otherwise would be admissible, it raises some doubt about the credibility of both JD's and Adamcik's evidence. Also, Emilien states that JD and Adamcik were dating during the time they worked for UTR. He submits that Adamcik "perjured himself when he said he had no sexual relationship with JD."

Another reservation that arises concerns the inconsistency of Adamcik's testimony that Emilien made comments about JD's breasts during breaks with the "boys". He testifies that he felt it was a joke, albeit inappropriate, when Emilien had said JD "has a nice pair of tits" and that he "would like to wrap her legs around [Emilien]." As well, he asserts that he had heard similar comments from the "boys", including Gauthier, during coffee or lunch breaks. Notably, at that juncture, Adamcik was a shop foreman. If the Board were to accept that evidence as credible, it would raise questions about the inconsistency in his behaviour regarding JD. It appears that he was quite protective of JD. The degree of his protectiveness is evinced in his testimony that he threatened to throw Gauthier through a plate glass window because he had touched JD's leg while tracing a run in her nylons. This is not to say the Board rejects all of his evidence. In fact,

the Board accepts his evidence, though it will not be given much weight, to the extent that it is consistent with his statement to the Commission on January 27, 1994: (*Exhibit 21*).

The Board observes a significant degree of contempt, disrespect and nonchalance in Gauthier's general demeanor during the entire proceedings including the way in which he testified. His evidence is replete with rationales or justifications that seem incongruous or untenable. As noted earlier, his evidence is replete with incongruities and inconsistencies. That raises marked doubts about the credibility and reliability of the totality of his evidence. In addition to the instances the Board pointed out earlier, there are several instances that support the Board's view. First, Gauthier denies ever touching JD except once to console her. At that time, he had put his hand on her shoulder when she was distraught because her son had not arrived at school on the bus. He had urged her to leave work immediately. Second, Gauthier denies categorically that he had witnessed an incident where Emilien allegedly inserted his hand under JD's skirt and pulled down her underwear. He testifies that he had observed JD running into the washroom upset. She came out after a while and he observed Adamcik speaking to her. There is no evidence before the Board that had inquired why JD was upset. When asked what JD and Adamcik were talking about, he replies: "it was none of [his] business." His behaviour in the latter incident seems antithetical of the friendly and compassionate employer he tries to portray of himself in his other evidence and the view Ms Daniels says she holds of him.

In addition, JD testifies that both were laughing hysterically after the alleged underwear incident. When she glanced at Gauthier, he was wiping away tears from his eyes. Gauthier's justification for their laughter is that at the time Adamcik had entered the office, he and Emilien were laughing and snickering at a joke Emilien was telling. The Board is more inclined to believe that they were laughing and snickering at what, quite sadly, they perceived to be a joke: that is, Emilien's deviant and diabolical conduct towards JD.

In a separate incident concerning JD's torn nylons, Gauthier testifies that he became aware of the matter because JD's was leading a commotion that interrupted a conversation he was engaged in with a customer, trying to collect receivables. He avers that he had observed Adamcik, Maitland and JD arguing. He was so upset that he asked them "what the heck is going

on?" By contrast, Maitland, who Gauthier called as a witness, testifies that he went to the shop to look for Gauthier and found him in JD's office, where there was an ongoing "commotion" about a run in JD's nylons.

Another concern about Gauthier's credibility relates to his evidence about the lap-dancing incident. While the Board believes that the lapdancing was consensual sexual behaviour, the Board is convinced it was then Gauthier directed the uncomely invitation to JD to sit on his lap and see what will pop up. Emilien, who was the other witness to the lap-dance incident, in giving evidence, felt it was necessary to demonstrate JD's actions. The Board thinks it is odd that he takes interest in explaining and demonstrating JD's actions and said it was not sexual, but he neither refutes nor buttresses Gauthier's evidence or JD's evidence about what Gauthier said or whether it was directed to JD. In addition to condoning and participating in uncomely conduct, neither Gauthier nor Emilien chided JD for her behaviour.

Another serious concern about Gauthier's credibility relates directly to his credibility of his evidence that JD's dismissal was pre-planned for January 20, 1994. He states, "we had her papers ready for January 20. Caroline was to bring them in with her." There is no evidence that he instructed Ms Daniels to prepare the documents before January 20, 1994. None of the people who he said was present at the meeting when that decision was taken corroborates his story.

The Board observes a significant degree of nonchalance in Emilien's general demeanor and his mannerism in giving evidence. The Board's concern with his evidence is that he denies categorically all the allegations against him with respect to sexual harassment and solicitation. However, he is selective in his evidence and submissions in other areas, which essentially, is self-serving. For instance, he submits that, JD often unnecessarily went to the shop to deliver messages to the employees. They would gather around her and that resulted in disruption of the work place. He states that he always got along with and liked JD. He states that JD and Adamcik were dating. He tries to explain away his business relations with UTR as merely visits with his son and that he was merely a good Samaritan helper. While the Board does not reject all his evidence, the Board finds, in general, he is not persuasive. To that extent, there are doubts about the credibility of most of his limited evidence. Although he expresses an interest to

preserve his investment in UTR, it is quite odd that he did not find it necessary to try to prevent unseemly conduct there. Nor did he chide JD when she voluntarily entered a conversation and began to demonstrate a lap-dance during working hours.

The Board's concerns about the credibility and reliability of Ms Daniels's evidence arise from her evidence during the hearing that is inconsistent with the oral statement she gave to the Commission in April 1999. Also, the Board was left with the distinct impression that she tailored her evidence in Gauthier's favour. It seems odd that Ms Daniels does not recall making that statement two years earlier, but she tried to impress upon the Board that she recalls what occurred at UTR seven years earlier, even though she prefaces her evidence by stating her memory was "fuzzy". Given the clarity with which Ms Daniels articulated certain parts of her evidence, the Board is inclined to conclude that her "fuzzy" memory was a factor of conscious accidents of the mind enhanced by intentional expurgation and selectiveness. The Board is inclined to give little or no weight to her evidence except where the evidence is corroborated by one or more witnesses.

Having assessed the credibility and reliability of the key witnesses, the Board turns to make specific findings under the ground of discrimination because of sex; sexual harassment and solicitation or advance and reprisal.

Sex Discrimination, Sexual Harassment and Solicitation or Advance

The Board accepts JD's evidence that Gauthier required her to do janitorial tasks and make the coffee. There is no evidence that any of the other male employees were required to do such tasks. As noted earlier, the Board concludes that the sole reason that Gauthier assigned JD to do those tasks was because of her gender.

The Board finds that Gauthier and Emilien made coarse sexual comments to JD about her breasts, her clothing and offered to "keep her warm because she did not have a man at home to do it for her." The Board is satisfied that the Personal Respondents knew or ought reasonably to have known, at least as early as September 1993, that JD found their conduct unwelcome.

The Board finds that at one point of the employee/employer relations among JD and the Respondents there was consensual sexual bantering. The Board concludes that after September 1993, but not after JD's first contacted the Commission, JD accepted, condoned or tolerated such behaviour. The Board is satisfied that in part, she tolerated the Respondents conduct because she needed the job so that she could support her son. Such bantering included comments about her breast, her hair, clothing, an invitation to keep her warm, the lap dancing incident and a comment or invitation to see what will pop up. The Board is not convinced that JD began informing the Respondents that their comments were unwelcome at the end of July/early August 1993. Alternatively, if she did in any way indicate an objection, more than likely, it was done in a manner that the Respondents failed to take seriously because of the previous consensual sexual bantering.

On the evidence, the Board notes that up until September 1993, the parties were engaged in a degree of social activities, e.g., attending JD's child birthday party; going camping; and borrowing or lending of a vehicle for JD's personal use. It seems that around September or October 1993, things changed. Further, Uppal's evidence, that the Board accepts, is that to the best of her knowledge JD first contacted the Commission around September or October 1993.

On the evidence, the Board concludes that the occurrences after September 1993 to JD's termination can be reasonably assessed as unwelcome conduct within the purview of the *Code*. JD testifies that the gratuitous touching began in September 1993. Also, she testifies that the two incidents involving Emilien happened in September 1993. It is quite possible that the September 4, 1993 incident was the straw that broke her tolerance of sexual bantering: when she felt that things were going too far.

The Board accepts JD's evidence that Gauthier and Emilien invited her, more than once, to sit on their "lap to discuss what will pop up first." The Board, however, accepts as persuasive Gauthier's and Emilien's, particularly Emilien's, evidence that JD tried to demonstrate lap dancing during working hours. He explained and demonstrated JD's acts and made it clear that no sexual gestures were involved. However weird this incident began, the Board is satisfied that

this untoward behaviour was consensual. The Board concludes that it is during this act that the Respondents first invited JD to sit on their "laps to discuss what pops up first." Further, the Board concludes that JD found this subsequent invitation unwelcome. However, given the previous occurrence, it is reasonable to conclude that "when they made the comment again," the Respondents could still have believed that she was just being coy when she replied that she was there to do her job and she had a chair of her own on which to sit.

The Board accepts JD's evidence that Emilien touched her shoulder and back and squeezed her buttock while she was painting on September 4, 1993. Also, the Board accepts JD's evidence that Emilien had called her in the reception area and then put his hand under her skirt that resulted in her underwear being pulled down when his finger(s) became entangled in it. The Board finds that there is an air of credibility and reliability in Adamcik's evidence on these two incidents, particularly the latter. His evidence about his reaction upon witnessing this incident is consistent with the way he states he behaved in the incident with the nylons. In addition, concerning the September 14, 1993 incident, the Board notes two significant common facts in the evidence of JD, Adamcik and Gauthier. First, that Emilien and Gauthier were laughing hysterically when JD was in the bathroom; and second, that when JD went to the bathroom, it was obvious that she was upset. The Board is satisfied that JD found both incidents unwelcome. Further, the Board finds that Emilien knew or ought reasonably to have known that such conduct was unwelcome.

Significantly, the Board notes that Gauthier took no action to protect, prevent or deter Emilien from such conduct. On the evidence, he not only condoned it by his conduct, he participated in the second incident by laughing hysterically about and failing to address the issue at al. Accordingly, the Board finds that he abrogated and abused his managerial and moral authority to cultivate and foster sexual harassment and a poisoned work environment.

Regarding the pantyhose incident in November 1993, the Board is satisfied that Gauthier either touched or tried to touch JD's leg in trying to trace the run in her nylons. On the totality of JD's, Adamcik's and Maitland's evidence on this issue, the Board finds Gauthier's evidence unbelievable. The Board is persuaded that JD told the men not to touch her. The Board is

satisfied that Gauthier knew or ought reasonably to have known that his behaviour was unwelcome. The Board accepts Adamcik's evidence that he not only witnessed the incident, but threatened Gauthier and Maitland and warned them not to harass JD any more or they would have to deal with him.

Poisoned Work Environment

The Board finds that Gauthier and Emilien cultivated and fostered a poisoned work environment at UTR on two bases: (a) they failed to take timely and appropriate steps to deter and prevent lewd behaviour and sexual harassment or solicitation in the workplace; and (b) they initiated, actively participated in or condoned the distribution of sexual paraphernalia at UTR. To that conclusion, the Board accepts JD's evidence that Gauthier received, by facsimile, cartons depicting coarse sexual jocularity and then distributed them around the office and, at least on one occasion, he sent it to someone externally: (*Exhibit* 4). Further, the Board accepts JD's evidence that she did, at least once, informed Gauthier that she found such material offensive to her sensibilities and unfit for the workplace. Also, the Board accepts Adamcik's self-incriminating statement that he and Gauthier brought some of the sexual paraphernalia to the office and some came by facsimile.

The Board rejects Gauthier's evidence that he took steps to correct the problem. Specifically, Gauthier states JD had picked up *Exhibit 5* from the facsimile and had told him she was offended by it. He was not at UTR when it arrived. A customer had sent it to him. He avers that immediately after JD brought it to his attention, he called the customer and told him he was displeased and asked him not to send any more of that kind of jokes to him. JD's account is that Gauthier brought the cartoon to her attention and asked her if she liked it. The Board is more inclined to believe JD's version for two reasons.

First, Gauthier denies seeing *Exhibit 4* at UTR. He avers that he might have seen it in another legal matter. *Exhibit 4* consists of three pages. Page two is a facsimile transmission sheet on UTR letterhead. It is dated October 29, 1993 at 12:00. It is addressed to "Wendy" from "Maurice & Julie" and signed by "Maurice." The Board accepts JD's testimony that she did not

give Gauthier permission to use her name. He did not contradict her. There is no evidence before the Board that the facsimile was sent to Wendy at UTR in error and Gauthier was simply forwarding it to her. Thus, it is reasonable to conclude that Gauthier was simply sharing what he considered a joke with Wendy. The Board is not convinced that Gauthier forgot he had seen the exhibit before. He made no attempt to correct his evidence. The Board concludes that this is just one example of Gauthier's mendacity that runs through the entire proceedings of this entire matter.

Reprisal

Based on the totality of the evidence relating to this issue the Board finds that, at the very least, JD's attempt to assert her rights as protected under the *Code*, was a factor in Gauthier's ultimate decision to terminate her employment. Further, on the face of the evidence, there is no doubt that Gauthier intended to dismiss JD. Or in the alternate, after being cautioned by the Commission's representative, he recklessly or wilfully proceeded to dismiss JD because he was angry she made a complaint to the Commission. The Board finds all of those justifications or rationales, although couched in legal language, are merely colourable.

First, the Board finds that Uppal's telephone call to Gauthier on January 20, 1994, more than likely, was a strong factor in Gauthier's decision to dismiss JD at once. The Board is not convinced that Uppal created a situation that provoked Gauthier and left Gauthier "no choice" but to dismiss JD at once. The uncontradicted evidence is that Uppal had identified herself as a person from the Commission and had informed Gauthier that she was calling because JD had made a sexual harassment complaint in which he was implicated.

Uppal recalls that Gauthier was very angry and confrontational during their telephonic conversation. He had told her immediately that he was going to fire JD that same day so what she was saying did not matter. She asserts he said he was firing JD because of "poor performance or lateness". He did say that JD's termination was pre-planned. But she admits she is not certain whether he had said "performance". JD's evidence supports Uppal's on the last point. The Board accepts JD's evidence that she overheard Gauthier angrily yelling to Uppal

that he was dismissing her because her work performance was poor. That was the first time she knew her job was in jeopardy.

The Board accepts Uppal's evidence that Gauthier was angry and confrontational during their telephonic conversation. The Board accepts JD's and Van Doorn's evidence that Gauthier was visibly upset and angry after the telephone call. Further, the Board accepts the corroborative evidence of Uppal, Van Doorn and JD that almost contemporaneous, after the telephonic conversation with Uppal, Gauthier dismissed JD.

Gauthier asserts that Uppal had created a situation that left him no choice, but to dismiss JD on January 20, 1994. His evidence is he told Uppal that a week earlier he had had a meeting with the Operations Manager (Van Doorn), the Accountant (Ms Daniels) and the Foreman (Maitland) and they had taken the decision to terminate JD's employment. Uppal contradicted him and said he was going to dismiss JD because of her telephone call. When he offered Van Doorn as a witness to corroborate his story, Uppal refused to speak to Van Doorn and insisted that Van Doorn would only lie for him. She kept insisting on speaking with JD so that she could have informed her that she would be dismissed. He refused to let Uppal speak to JD. He told Uppal that it was his duty to inform JD she was being fired. At that juncture, he told Uppal "...you leave me no choice but to go over and release her from her duties at this time." He gave the telephone to Van Doorn and went to JD's office and told her "very calmly" that she was dismissed "as of now."

The Board finds Uppal's evidence more veracious than Gauthier's. First, in giving evidence, the Board finds that Uppal seems to be a credible witness. She articulated her evidence forthrightly. She was consistent: neither seeking to be economical with information nor to embellish her evidence. Second, Gauthier's evidence on this issue does not seem credible, persuasive or reliable. Third, although Van Doorn states he could only recall a "few things", the Board finds that there was an air of veracity in parts of his evidence. In the main, the Board had the distinct impression that he tailored his evidence in favour of Gauthier. As is the case with Ms Daniels, the Board has the distinct impression that the "few things" Van Doorn is able to recall are more the conscious episodes of the mind circumscribed by intentional omissions and

selections. To some extent, connected up with other evidence, his evidence supports reasonable inferences drawn from Uppal's and Gauthier's evidence. To some extent Van Doorn's evidence, actually and inferentially, is inconsistent with Gauthier's. There are two specific areas that are relevant to the Board's findings on the issue of reprisal.

Van Doorn's evidence is helpful on two major points: (a) that Gauthier was angry and upset after a telephone call: and (b) that Gauthier had held a private meeting with JD about dismissing her. Before Gauthier had spoken to JD, Gauthier had informed him that he intended to terminate her that day. Those two points support four reasonable inferences: (a) that more than likely, Gauthier was indeed angry and confrontational during his discussion with Uppal; (b) that more than likely, in the heat of his anger he decided to dismiss JD immediately because of Uppal's allegations; (c) that JD's dismissal was almost contemporaneous with the Commission's telephone call; and (d) that more than likely, Van Doorn had only learned of Gauthier's intention to dismiss JD after the telephonic conversation with Uppal and while he was on his way to JD's office. Therefore, Gauthier's evidence that he had taken the decision to dismiss JD on January 20, 1994, during a meeting with Van Doorn, Ms Daniels and Maitland on January 12, 1994, is not credible.

Ms Daniels' evidence supports the last inference. She recalls that no one else was present when Gauthier told her that he had decided to lay off JD. As noted above, her evidence does not support an inference that Gauthier had given her specific instructions prior to January 24, 1994 to prepare JD's termination papers. When asked why it took Gauthier one week (from the alleged meeting) to dismiss JD, she replies that he might have decided to give her another chance. The fact is, Ms Daniels did not prepare JD's ROE until January 24, 1994. JD received her termination documents and cheque on February 1, 1994.

The Board is satisfied that a factor in Gauthier's decision to dismiss JD prior to January 20, 1994 was because she tried to assert her human rights. The Board accepts Ms Daniels' and Ms Gauthier's evidence that Gauthier talked about terminating JD's employment between October 1993 and December 1993. Also, the Board accepts JD's evidence that she posted the Commission Code Card and Sexual Harassment Policy in UTR's workplace after her meeting

with Uppal. It disappeared. The Board is satisfied that quite likely, that arrested Gauthier's attention and made him aware that JD had gone to the Commission. The Board is inclined to believe that was a reason he became so critical of her work performance during that period.

The Board finds that Gauthier's acts in canceling JD's last pay cheque and then deducting moneys from her severance moneys were without legal justification and therefore, part of the retaliatory continuum. As noted earlier, the Board rejects Gauthier's justification that JD exaggeration her work hours. The Board has great difficulty appreciating why Gauthier allowed JD to continue to prepare the payroll and signed her pay cheques if he knew since early December 1993 JD was exaggerating her work hours. The same is said for the fact that he reviewed the January 17, 1994 payroll and signed JD's pay cheque and then placed it in JD's filing cabinet. There is no evidence that he instructed JD not to distribute the pay cheques. However, the Board does not consider the delay in receiving her termination documents as a separate act in the retaliatory continuum.

The Board has already determined that JD's dismissal was not pre-planned for January 20 or 21, 1994. That is why the papers were not ready. The Board attributes the further delay to Gauthier's inability to prepare the necessary documents and his great reliance on his lawyer, the bookkeeper and his sister, Ms Gauthier, to prepare those documents. The Board has taken the same decision with respect to the delay in receiving the T-4 document.

The Board finds that Gauthier's instruction to Ms Gauthier to call the police, her calling the police and Gauthier's letter concerning trespassing are also acts in the retaliatory continuum. The Board is satisfied that there is no credible evidence before it to justify those acts. Gauthier gave evidence that Ms Gauthier had informed him that JD and Adamcik were in the office and were harassing her. He avers that based on that information, he had instructed Ms Gauthier to call the police. Ms Gauthier gave evidence; yet Gauthier failed to address this issue. He was represented by legal counsel. Moreover, the uncontradicted evidence is that Gauthier had invited JD to the office to pick up her T-4 anytime.

Finally, the Board accepts Gauthier's, Ms Daniels and Ms Gauthier's evidence that between October 1993, December 1993 and January 1994 there were discussions about terminating JD's employment because she was not performing her job well. The Board infers that even though Gauthier had hired JD as a receptionist/secretary, they felt accounting or bookkeeping functions were very crucial to the viability of his financially troubled business. Thus, he sought help from Ms Daniels and Ms Gauthier: both had long experience in either field. Ms Daniels had remarked that there was not enough work for her and JD. Thus, it is reasonable to conclude that at some point, sooner than later, during her employment, Gauthier would have had to lay off JD.

Emilien's Relation with UTR

The Board is satisfied that UTR was an incorporated entity and that Emilien and Gauthier were the owners, and, more than likely the directors or officers of it. Alternatively, even if Emilien was not an owner, a director or an officer, at the very least, he was an agent or *de facto* employee of UTR and specifically for Gauthier. By his conduct, Emilien created the impression that he had the authority to hire or dismiss any employee. The Board finds that when Emilien visited UTR, he did perform work. The Board is satisfied that whatever tasks he did, was done, at the very least, for Gauthier, who was an operating mind of UTR.

The Board is satisfied that JD held the belief that Emilien was in a position of control at UTR. And, that he was in a position, to confer, grant or deny her benefits. That is a reasonable perception. JD testifies that Emilien visited UTR five to ten times monthly. She observed on several occasions, he physically worked in the shop. He directed employees. He asked her about inventory of supplies. He argued with employees and tell them if they did not like how UTR was being managed they could leave. He told her and other employees that his money made it possible for them to have a job. When Gauthier was away, employees reported to Emilien.

JD testifies that Emilien was in a co-partnership with Gauthier: (*Exhibit 2*, p.2). It is a copy of the Ministry of Consumer and Commercial Relations' ("MCCR") business name

registration. It indicates that both Respondents are partners. Neither Emilien nor Gauthier denies that the signature on that document is his. Page one of that exhibit, that is the "Articles of Amendment" of UTR indicates a name change from "104722 Ontario Limited" to "Ultimate Truck Repair, Paint and Collision Limited" it does not indicate the name of the owner. JD enters that document in support of her evidence. It indicates that the change was effective as at October 9, 1993. However, there is no evidence before the Board whether at UTR was an incorporated or incorporated business. It is well established principle in corporate law that an unincorporated business is deemed a partnership where there are two or more owners.

Adamcik's evidence supports JD's. In addition, he states that Emilien gave advice or instructions to Gauthier about the operation of UTR. He states that when Emilien was present, "he was the big boss."

In cross-examination Gauthier admits that he had informed the Commission that he was in partnership with Emilien and both were the chief executives and/or owners of UTR: (*Exhibit 23*). Emilien testifies that he loaned Gauthier $25,000 to begin UTR. He asserts that he was never a partner. He admits that he visited UTR and did tasks at the business including collecting receivables when Gauthier asked him to do so and he had worked on trucks sometimes.

Although Emilien and Gauthier testify that at one juncture Gauthier became the sole proprietor, neither buttressed their evidence by documentary proof. In the Board's view, even though a respondent is not legally obliged to give evidence, the onus shifts to both Respondents to show that Emilien was not an owner, a director or an officer of UTR or that he was not an employer, an agent or employee of UTR at the relevant times of this matter. Neither Respondent has discharged that onus. Further, the Board is satisfied that JD was not in a position to refuse if Emilien gave her an order. And, as stated above, if he did give her an order, he would be doing so, at the very least, as an agent of UTR or Gauthier.

ANALYSIS

The Law

Liability

The Board finds that Emilien and Gauthier were the directing minds of UTR. Concerning the violations of subsection 5(1) and section 8, according to the canons of corporate law, UTR would have been liable for their acts: (subsection 45(1) of the *Code; McPherson v. "Mary's Donuts"* (1982), 3 C.H.R.R. D/961 (Ont. Bd. of Inq.). Also, as the perpetrators and the operating minds of UTR, it would have been liable for their acts with respect to subsection 7(2) and paragraph 7(3)(a). In this case, however, the record shows that the Commission did not name UTR as a corporate respondent because it is no longer in business. There are only the two personal respondents. In the Board's view, where there is no corporation to hold liable, the personal respondents, which includes owners, partners, directors or officers, agents, employers, *de facto* employers or employees or the directing minds of the entity, are, jointly and severally liable for their unlawful conduct.

Notably, subsection 45(1) states: "[f]or the purposes of this Act, except subsections 2(2), subsection 5(2), section 7 and subsection 44(1), *any* act or thing done...by an officer, official, employee or agent of a corporation...shall be deemed to be...done by the corporation..." (Emphasis added). By necessary implication, it includes the acts done in violation of section 8. In this case, as the co-owner, or partner of UTR, *inter alia*, Emilien is responsible for the damages arising out of JD's dismissal. It matters not that Emilien was not directly involved in JD's dismissal. It is enough that the Board found that Gauthier intended to dismiss JD, or was wilfully blind or reckless in doing so. As co-owner, or partners, *inter alia,* since Emilien was equally entitled to reap the fruits of UTR, he is entitled also to reap the bitter gourd that flows from its existence. That approach is necessary so that the purpose of the *Code* is satisfied, which includes that a complainant will not be left without a remedy. Accordingly, the Board finds Emilien and Gauthier are jointly and severally liable to JD for all the unlawful acts that are contrary to the *Code* that she sustained while employed at UTR and for the pecuniary damages awarded in this matter.

1. For the purpose of the Code, what was Emilien's relation with UTR at any or all relevant times during the course of these incidents?

The Board found that Emilien is an owner, partner, *de facto* employee and employer. Alternatively, at the very least, Emilien was an agent for Gauthier or UTR when he visited and performed tasks. It is trite law that one who acts for another whether for any form of compensation is the agent for whom that person acted. Therefore, for the purpose of this case, the Board finds that Emilien was an owner, partner, director or officer, agent or a *de facto* employee or employer of UTR at all relevant times in this matter.

2. Did the Respondents violate JD's right to equal treatment with respect to employment without discrimination because of her gender within the purview of subsection 5(1) of the Code?

The Board finds that JD was treated differently from other male employees and was discriminated against based on her gender. First, within the context of the milieu that existed at UTR, JD was required to clean the male washroom and make the coffee. There is no evidence before the Board that other male employees were required to do those tasks. The Board concludes that the reason she was ascribed those tasks was more than likely because she is a woman. In addition, the nature and pattern of conduct of Gauthier and Emilien towards JD is a form of inappropriate sexual conduct and happened because she is a woman. Also, based on the evidence, the Board is satisfied that vulgar sexual paraphernalia were posted in the male washroom that JD was required to clean. The Board finds that some materials are tantamount to pornographic material. Accordingly, the Board finds that these incidents entered as Exhibits created a poisoned work environment for JD. The Board finds that all of the foregoing acts constitute discrimination on the basis of gender within the purview of subsection 5(1) of the *Code*. (*Drummond v. Tempo Paint and Varnish Co.,* [1998] O.R.R.B.I.D. No. 11; *Abdolalipour v. Allied Chemical Canada Ltd.*, [1996] O.H.R.B.I.D. No. 31).

3. Did the Respondents violate JD's right to freedom from harassment in the workplace because of her gender by her employer or agent of the employer or by another employee within the purview of subsection 7(2)?

Yes. The Board finds that Gauthier knew and participated in bringing sunshine girl pin-up pictures, cartoons and written sexual jokes in the workplace. Further, the Board finds that these were displayed in the shop, where she was at some point required to take messages to the men and in the male washroom that she was required to clean. The Board is satisfied that JD found them offensive and asked Gauthier to remove them, but he failed to do so. Accordingly, the Board finds that the presence of such material in the workplace constitutes sexual harassment: (*McLeod v. Bronzart Casting Ltd.,* (1997) 29 C.H.R.R. D/173 (Alta. H.R.P.)).

The Board finds that Gauthier and Emilien made comments to JD about her breasts and her clothing that she did not accept as humour. The Board finds that their behaviour constitutes a course of vexatious conduct and comments. The Board accepts Gauthier evidence that there was some degree of sexual bantering between him and JD. But he failed to lead evidence regarding the nature of the banter. He simply made a blanket statement, no doubt to create a distorted depiction that could effect the Board's determination of facts. Ms Daniels testifies that JD engaged in "off-colour" jokes with sexual undertones. No evidence, however, was lead to indicate that the jokes were vulgar or lewd. Therefore, even if JD participated in "off-coloured" jokes or sexual bantering, there is no evidence of sexually explicit conduct or conversation from which the Board can infer her conduct created a bar to all of her legal rights under the *Code*.

Indeed, there is evidence about JD demonstrating a lap-dance that the Board finds likely to have occurred in September 1993. There is no evidence that it occurred before or after September 4 or 14, 1993, or after JD initially contacted the Commission. The Board has great difficulty believing that JD would have engaged in consensual sexual bantering or such lewd conduct after she had contacted the Commission. Further, there is no evidence before the Board that JD's conduct, at least from the time she initially complained to the Commission, was inconsistent or that she sent mixed messages to Gauthier and Emilien that she found their

behaviour unwelcome. Finally, Gauthier's justification of "sexual bantering" and Emilien's blanket denial imply that both knew the conduct was improper and unwelcome.

4. *Was JD's right to be free from sexual solicitation or advance within the purview of paragraph 7(3)(a) violated?*

The Board finds that Gauthier and Emilien violated JD's right as protected within the purview of paragraph 7(3)(a) of the *Code*. The Board found that, at least on two occasions, September 4 and 14, 1993, Emilien touched JD intimately and inappropriately. JD found his conduct unwelcome. The Board believes that it was apparent to him that JD was vulnerable and immature and frolicsome and took advantage of her naïveté. Previously, he had extended an invitation to her to keep her warm. When such conduct is considered in the context of the ongoing lewdness and objectionable sexual conduct, there is no doubt that Emilien intended to commit both acts. Again, there is no evidence before the Board that JD's behaviour could have incited Emilien's conduct in either incident or that his conduct was consensual. Thus, the Board finds that Emilien's conduct constitutes solicitation or advance.

Also, the Board finds that Gauthier's conduct constitutes sexual solicitation or advance. The Board is satisfied that Gauthier was aware of both incidents. There is no evidence before the Board that he chided Emilien, or apologized to JD or took any action to prevent a future incident. He had a legal duty to protect JD from such conduct. He failed or refused to do so. Finally, the Board is satisfied that Emilien and Gauthier knew or ought to have reasonably known that such lewd behaviour was unwelcome.

In addition, the Board found that Gauthier and Emilien extended an invitation to JD to keep her warm because she was cold and did not have a man at home to keep her warm. Both knew of JD's circumstances. In isolation, the Board could perceive the comment as a sexual joke made in dubious regard to her feelings. However, given their knowledge of JD's vulnerability, and where previous or subsequent acts of unwanted touching had occurred, it is reasonable to construe the conduct as an intention of sexual solicitation or advance. As the employers, there is no doubt that JD knew that Gauthier and Emilien were in a position to grant

or deny a benefit or advancement to her. In addition, based on the factual finding, the Board is satisfied that JD had reasonably believed that Emilien was in a position to confer, grant or deny a benefit or advancement to her.

5. *Was JD's right to claim and enforce her rights under the Code pursuant to section 8 violated by the Respondents?*

The Board finds that by dismissing JD, Gauthier violated her right under section 8 of the *Code*. The Board finds that Gauthier intended to dismiss JD because she tried to assert her human rights. Or, at the very least, he was reckless or wilful in firing her. The Board is believes that the primary factor in Gauthier's decision to dismiss JD instantly on January 20, 1994, was the call from Uppal. The Board found that Gauthier dismissed JD almost contemporaneously upon being advised by Uppal that JD had lodged a sexual harassment complaint against him. There is no doubt that Gauthier's decision was motivated by retaliatory concerns. Further, the manner in which he dismissed JD was tainted by retaliatory motives. The comments to Uppal and his language to JD in dismissing her, on their face, support such a finding. The Board is satisfied that Uppal informed him of the reprisal section of the *Code*. Yet, he proceeded to dismiss JD forthwith. Accordingly, the Board finds that he was reckless and wilful in dismissing her.

The Board found that Uppal did not create a situation that left Gauthier with no other option, but to dismiss JD. Neither provocation nor candid confrontation by the Commission about an allegation of discrimination is a lawful excuse for firing an employee because s/he tried to assert his or her rights under the *Code*. A complainant must not be held liable for the act of the Commission. Nor should the Commission's action negatively affect a finding of liability in favour of a complainant: nor should it negatively affect damages.

Gauthier had put forward the justifications or rationales of poor work performance, exaggeration of work hours, disruptiveness of the work place, and insubordination as legal defences for dismissing JD. The Board found that those justifications or rationales are mere

ploys. However, even if they were *bona fide* legal excuses, because discrimination was a factor in deciding to dismiss JD, necessarily, there must be a finding of reprisal.

In sum, the Board finds that Gauthier and Emilien violated subsection 5(1) and 7(2), paragraph 7(3)(a) and section 8 of the *Code* contrary to section 9. Further, JD's dismissal from employment was a loss arising directly from the infringement of JD's rights as protected by subsections 5(1) and 7(2) and paragraph 7(3)(a) of the *Code.*

REMEDY

The Board's remedial authority is stated in subsection 41(1) of the *Code.* Under paragraph 41(1)(a) the Board has ordered personal remedies and public interest remedies. Under paragraph 41(1) (b), and the Board has ordered three categories of monetary compensation for the loss arising out of the infringement, namely: (i) pecuniary loss, colloquially called "special damages"; non-pecuniary loss, colloquially called "general damages"; and mental anguish.

In Respect of Compliance and Future Practice

The Commission asks the Board, and JD adopts it, to make the following order:

> (a) order the Respondents to attend training programme, approved by the Commission, designed to assist employers and managers in identifying and addressing instances of sexual harassment and solicitation in the workplace.

Gauthier testifies that he is a senior appraiser and sales representative with Collision World Ltd. His functions include promoting his employer's business to non-customers. Gauthier's actions throughout the proceedings and the likelihood that he deals with females in his job incline the Board to order that he attends a training programme to assist him in sensitivity training, and to identify and address sexism, sexual harassment and solicitation in the workplace.

Restitution

Pecuniary Tangible Loss

Under this heading the Commission and JD ask for compensation as follows:

(a) for the period January 20, 1994 to February 20, 1995: a period of 56 weeks, at the rate of $12 per hour for a 49 hour work week: ($32, 928);

(b) the difference in pay between UTR and Humber Bay Dental Clinic from February 21, 1995 to May 41, 1995: a period of 14.3 weeks, at the rate of $2. per hour for a 49 hour work week: ($1,400.28);

(c) reimbursement for expenses incurred for job searches for the period January 20, 1994 to April 25, 1994, and December 15, 1994 to February 20, 1995: "(at a rate of $30/week x 22.9 weeks + $10.50 + $6/week x 22.9 weeks). This amount totals $834.90";

(d) reimbursement of expenses incurred for attending Toronto School of Business Assistant Dental Care Programme: ($4, 936.76); and

(e) Prejudgment interest at a rate of 8.3% as per section 127 of the *Courts of Justice Act* and post judgment interest.

The Board accepts JD's evidence that after her dismissal on January 20, 1994 she searched diligently for work. To that end she incurred expenses for gasoline – about $30 weekly, photocopying her résumé, attending meetings with her lawyer, going to and from the Employment Insurance ("EI") office, weekly subscription to the Toronto Star - $6 weekly, and $4,495 in tuition fees. OSAP underwrote her loan. She avers that the impetus for going back to school was because of her unsuccessful job search. It was an attempt to enhance her chances to find a permanent job. She had discussed it with her counselor at the EI office. She studied dental chair-side assisting.

In addition, JD testifies that she attended school from April 25, 1994 to mid December 1994. At the end of the period she commenced a job search, but for a dental assistant position. She found a full-time job and commenced working on February 21, 1995. Her rate of pay at that job was $10 per hour until May 1995 when she received a $2 per hour raise. She worked there

until June 6, 1995. She resigned because she was unable to find a reliable babysitter. She did not return to work until September 1995. Currently, she is working at home caring for her two children and doing her spouse's bookkeeping. As at the hearing, she was looking for employment outside the home.

In cross-examination, she admits that she knew UTR was experiencing financial problems and that employees were constantly being laid off and then others were rehired. Essentially, the work force fluctuated between ten to twenty employees. Quite likely workers were laid off when there was not enough work and workers would be rehired when the workload increased. However, she avers that she did not entertain the idea that she could have lost her job.

Gauthier's counsel argues that JD's claim is excessive. He argues that JD failed to mitigate her damages and that her decision to go back to school rendered her unable to search for work for a year. He argues that had she not returned to school, she would have found work sooner. He urges the Board to reject her wage loss.

The Board is satisfied that bookkeeping functions were crucial to UTR at that juncture. JD was neither trained nor capable to do those tasks efficiently. If all things were equal at UTR, sooner than later JD would have been laid off because she was unable to do bookkeeping functions. The Board accepts Ms Daniels' evidence that there was not enough work for keep a bookkeeper and a receptionist/secretary employed full-time. It is clear that at the time UTR was experiencing financial hardship.

The Board notes that JD had worked at UTR for a period of eight months. A significant factor that kept her at UTR was the flexibility of the job. The Board notes that flexibility was absent in the dental job she took after her graduation from the dental programme. She left the job three and a half months later because she was unable to find reliable day care for her children. It is obvious that JD had been the dominant, if not the only caregiver of her young son at that time.

In determining the appropriate period for which JD ought to be compensated, the Board has considered the evidence above. In addition, the Board believes that the period for which compensation is awarded ought to cover, but not exceed, a reasonably foreseeable period to allow JD to seek and obtain alternate employment. Giving effect to the significant notion of common sense, those factors guide the Board to conclude that a period of fifteen (15) weeks is adequate in all the circumstances of this matter. The standard workweek is generally forty hours. The Board notes that the maximum threshold an employer can require an employee to work without the employer's legal requirement to pay over-time is forty-four (44) hours: (subsection 22(1) of the *Employment Standards Act*, 2000, S.O. 2000, c. 41, as amended. Gauthier testifies that they had agreed to a forty-four hour workweek. JD testifies that they had agreed to forty hours and more. *Exhibit 1* indicates that JD's mean workweek was in excess of forty-four hours. The Board finds that a forty-four hour workweek is adequate given the nature of the work arrangements that existed between JD and Gauthier.

JD would be reimbursed for her job search expenses for the same period. *The Board states specifically that there is no award for JD's expenses to visit her legal counsel.* In the Board's view, these expenses are integral to legal costs. The Board has no statutory power to award legal costs to a complainant (Ontario (Human Rights Comm.) v. Ontario (Liquor Control Bd.) (1988), 9 C.H.R.R. D/4868 (Ont. Div. Ct.). There shall be prejudgment interest on the aggregate monetary compensation of $8,470.50, according to section 128 of the *Courts of Justice Act* from the February 9, 1994 to May 31, 2001.

The Board finds that the tuition expenses are too remote to consider them compensable. Within the context and facts of this case, the Board is not convinced that this expense is reasonably foreseeable. Nor does the Board believe that the Respondents ought to be held financially liable for JD to obtain qualifications to "enhance" her chances to find a permanent job. The tuition fees or any expenses relating to going back to school are not allowed. There would be no compensation for the difference in earnings between her job at UTR and the dental assistant job.

Loss arising out of the Infringement and Mental Anguish

The Commission and JD seek $15,000 for humiliation, loss of dignity, and loss of confidence associated with her experience of sex discrimination, sexual harassment, and sexual solicitation; and $15,000 for the same impact with respect to reprisal. In addition, they seek an additional $10,000 for mental anguish for each of the infringement.

The plain reading of paragraph 41(1)(b) does not support an approach to the quantification of damages based on an infringement of each right. Implicitly, it allows for the inclusion of a sum for mental anguish in the overall quantification of monetary restitution. The assessment of damages ought to be done based only on the nature and severity of the impact on the Complainant. There is no Solomonic sword by which one can reasonably separate the degree of an impact of one infringement from another, particularly, where a finding of sexual harassment necessarily leads to a finding of discrimination on the basis of sex. Accordingly, in this case, except for reprisal, the Board has quantified damages on a global basis, having considered the overall impact of the Respondents' conduct on JD. Although reprisal was quantified separately, the Board's order shows a sum for all the infringements and for mental anguish.

The Board summarises JD's testimony regarding the impact of the Respondents' conduct on her. She was "fed up and extremely frustrated;" "very angry that they did not honour [her] previous request…to stop leaving [sexual paraphernalia] on her desk;" she "felt like she was a play toy for their entertainment;" "[Emilien's] hand went even further up my skirt and then my underwear was pulled down…[she] was shocked and stunned at the same time;" as result of the same incident she "was crying a lot...had puffy eyes for the entire day…embarrassed became some employees noticed her puffy eyes…felt sick, humiliated – felt like a toy…even to this day when I think about what they did, I can still hear the laughter…very wicked and cruel…I have never worn [the outfit] again after that day;" the panty hose incident she was "angry and upset and told the men not to touch me."

JD testifies that the whole ordeal affected her in many ways. She felt humiliated, sad angry and cheapened and used. She became afraid to enter areas alone if there were men: e.,g., entering an elevator: she was afraid to trust men. Also, she would not apply for secretarial jobs with body shops during her job search. She felt that she could not take the chance for fear she would have a similar experience. She still has that fear and does not respond to advertisement for jobs in body shops or repair shops. She is still afraid to trust men. In addition, her abilities to eat and sleep were affected: as a result she lost a lot of weight during the time she worked at UTR and after she was dismissed. She attributes those problems to the enormous stress she experienced.

During cross-examination Gauthier's counsel confronted JD about her application for at Acklands Truck Ltd., Classic Truck Ltd. and Western Star Trucks, which were also male dominated entities much the same as UTR. JD accedes that the employees in the trucking industry are predominantly male.

Gauthier's counsel argues that JD knew the sub-culture of those businesses, yet she was not deterred from applying there for jobs. Thus, if her experience had such a profound impact on her, she would not have sought work in male dominated work places. Further, he argues that what is more telling about the severity of loss is that she failed to adduce any medical evidence to substantiate the emotional harm she averred she suffered. He submits that the impact on JD's emotional well-being was minimal at best, at worst, non-existent. Accordingly, he urges the Board to award a nominal sum, if any.

Counsel for the Commission submits that this case is analogous to *Curling v. Torimiro* [2000] O.H.R.B.I.D. No. 8 and No. 16. Indeed, *compared to Curling, supra,* the Board hardly found any substantial similarities. Even though certain facts are similar, the circumstances, the ambience and the Complainants' demeanor were not at all the same.

Emilien does not submit a position specifically. He argues, however, that he took no part in JD's dismissal. He never touched JD and he believed her pursuit of a human rights claim is JD's and Adamcik's agenda to make him and Gauthier pay for their dismissal. In other word, he

denies this matter categorically. Therefore, in his view, JD did not suffer any loss, and if she did, it was not attributable to him.

The Board found earlier that Gauthier and Emilien intended their conduct or at the very least, they acted wilfully or recklessly at the time they infringed JD's rights. The Board is satisfied, based on the facts, that JD sustained mental anguish as a result of the Respondents objectionable conduct. Mental anguish is on the lowest end of injury that one may sustain and does not require medical proof to establish a claim successfully.

Based on the finding of facts, the Board is convinced that an appropriate monetary compensation for the loss arising out of the infringement *including* mental anguish, in all the circumstances of this case is $25,000. There shall be no award for prejudgment judgment interest on this head of damages.

ORDER

Concerning compliance about future conduct and practices, the Board makes the following orders:

> (a) until this judgment is paid in full, Emilien Gauthier and Maurice Gauthier shall inform the Commission, within five business days of relocating, any change of address and telephone numbers;
>
> (b) Maurice Gauthier shall inform the Commission of his current employer and any change in his employment situation within five days of the change;
>
> (c) Maurice Gauthier shall attend a programme designed to sensitize supervisors to identify and address instances of gender-based discrimination including sexual harassment and sexual solicitation or advance.

Concerning restitution for quantifiable monetary loss, the Board makes the following orders:

> (d) Emilien Gauthier and Maurice Gauthier, jointly and severally, shall pay to JD the amount of $8,470.50, plus prejudgment interest from February 9, 1994 to May 31, 2001, according to the *Courts of Justice Act, supra*;

(e) Emilien Gauthier and Maurice Gauthier, jointly and severally, shall pay JD the amount of $25,000. for loss arising out of the infringement of the right, including reprisal and mental anguish; and

(f) If the total compensation is not paid within sixty days of the date of this decision, they shall pay post-judgment interest calculated according to the *Courts of Justice Act, supra.*

CONCLUSION

Human rights culture in the workplace is to develop and foster attitudes and practices that respect, promote and protect the human rights of individuals. It is the legal and moral duty of every employer to ensure human rights culture is developed, maintained and sustained. It is clear from Human Rights Legislation and jurisprudence that the inclusion of *gender rights* as enumerated grounds of discrimination in Human Rights Legislation, is to help ensure that women's human rights are not ignored, marginalized or subordinated within the Labour Relations Regimes. To that end, every employer is charged with the legal duty to prevent, to promote and to protect gender rights as human rights in the workplace. It is incumbent upon every employer to proactively develop and cultivate that culture so the personhood of its employee is insulated from sexual harassment and all other forms of discriminatory acts in the workplace. Employees should expect to go to work and feel secure from discriminatory acts by their fellow employees and moreover, their employers. Human Rights Law will be invoked to protect employees when employers abrogate their responsibilities, or they too become the perpetrators.

Finally, the adjudicator appreciates the patience exercised by all the parties and their counsel in waiting for the Board's decision and reasons. Sincere apology to everyone for any inconvenience the delay has caused you.

Dated at Toronto, this 22nd day of May 2002.

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Patricia E. DeGuire, Vice-Chair